



THE  
MECHANISM  
OF THE  
MODERN STATE

A TREATISE ON  
THE SCIENCE AND ART OF  
GOVERNMENT

BY

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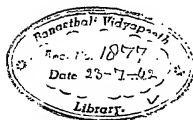
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## PREFACE

THE primary purpose of this book is to set forth the actual working of the English Constitution. Its method is mainly analytical ; but no one can apprehend the genius of an historical Constitution from mere analysis. I have, therefore, traced the historical evolution of the principal organs of the Body Politic, both as they function in England and in the British Dominions. With constitutional history and political analysis there mingles also a certain amount of political philosophy ; for neither philosophy nor history can yield their appropriate fruit unless cultivated in close conjunction. The method adopted in this work is indeed the outcome of a strong conviction that the Political Institutions of any one country cannot profitably be studied in isolation. Accordingly, to the main body of this work short studies are prefixed of three types of ' Democracy ' which severally present a sharp contrast with each other and with the parliamentary type of Democracy gradually established by a prolonged process of evolution in this country. I have not, however, attempted a comprehensive survey of the democratic communities of the modern world. That task has been accomplished once for all in Lord Bryce's masterly treatise on *Modern Democracies*, but Lord Bryce has nothing to say of British Democracy (save in its newer homes overseas), which supplies my central theme. Where I have strayed from that central theme (conspicuously in Books II, VI, and VIII) it has been for purposes of illustration and comparison, in order to bring into clearer relief the characteristic features of the English Polity.

More than three hundred and fifty years ago Sir Thomas Smith thus described the scope and purpose of his *De Republica Anglorum*, and I can find no words which more



aptly indicate the purpose I have myself had in view. I therefore quote his :

' I have declared summarily as it were in a chartre or map, or as *Aristotle* termeth it *ὡς ἐν τάρτῳ* the forme and manner of the Government of England, and the policie thereof . . . Wherefore, this being as a project or table of a common wealth truely laide before you, not fained by putting a case: let us compare it with Commonwealthes, which be at this day *in esse*, or doe remaine discribed in true histories, especially in such pointes wherein the one differeth from the other, to see who hath taken the righter, truer, and more commodious way to governe the people as well in warre as in peace. This will be no illeberall occupation for him that is a Philosopher and hath a delight in disputing, nor unprofitable for him who hath to doe and hath good will to serve the Prince and the Commonwealth in giving Counsell for the better administration thereof.' (28 March 1565.)

The present work, then, is an attempt to epitomize the work of a life which has been consistently devoted to 'Politics'. That term does not, of course, mean merely or mainly the interesting 'game' by which the term is frequently but improperly monopolized. By 'Politics' we should understand, on its abstract side, the Theory or Science of the State: as a practical adventure, the service of the State. This book represents a portion of my personal contribution both to Science and to Service. The main lines of the work were laid down some twenty-five years ago, but my interest in the subject dates much farther back. By a curious freak of memory I can trace it to the day when, as a schoolboy, I picked up a copy of A. de Fonblanque's *How we are Governed*. The book is not attractive either in style or mode of presentation, but it laid hold on one schoolboy's imagination and largely determined the tenor of his life. Interest in political Institutions led me first to the study, and later to the teaching and writing, of History; later still it carried me into an active political career.

The completion of the present work has been unduly delayed, but the delay has, perhaps, had its compensations. Fifteen years ago I published two preliminary studies—*Second Chambers : an Inductive Study in Political Science*, and *English Political Institutions* ; and those books were followed by many others. In the interval I have had the opportunity of studying *in situ* some foreign systems of government, and in particular of studying at close quarters our own. The experience of the actual machinery of government gained as a member of the Select Committee on Public Expenditure (1917-18), of the Public Accounts Committee, and above all as Chairman of the Estimates Committee, not to mention the Second Chamber Conference (Bryce Committee, 1917-18), has been invaluable to me, and will, I trust, be reflected throughout this book, and particularly in the chapters on Parliamentary Procedure, on the Civil Service, and on the Structure of the Legislature.

In the long course of my investigations I have incurred innumerable obligations. Some can only be acknowledged in general terms, since several who have rendered me conspicuous help are responsible members of foreign Embassies and Legations, and others are high officials in our own Public Departments. The traditions of both services discourage, if they do not forbid, public acknowledgement, and must of course be respected by me ; but I may without impropriety gratefully acknowledge my debt to Sir T. Lonsdale Webster, K.C.B., the Principal Clerk of the House of Commons, who read in manuscript the chapters on Procedure, and by his careful correction has relieved me of all anxiety as to the accuracy of my treatment of that intricate subject ; to Sir Malcolm Ramsay, K.C.B., the Comptroller and Auditor-General, who similarly read and corrected the Appendices on Financial Procedure ; to Lt.-Col. Sir Maurice Hankey, G.C.B., Clerk to the Privy Council and Secretary to the Committee of Imperial Defence, and the Cabinet Secretariat, who kindly allowed me to discuss with him certain points in relation to the

Executive, and gave me much valuable information ; and to Mr. Austin Smyth, Principal Librarian of the House of Commons, and to his assistants, who have been uniformly patient and kind in helping me in the toilsome task of verification of references, especially to Parliamentary Papers and other 'Blue-books'. Without the help of my friend Dr. R. W. Macan, formerly Master of University College and Reader in Ancient History, I should hardly have ventured to analyse Athenian Democracy. The index owes much to my wife.

I have incorporated in the present work a good deal of material published in the two preliminary studies mentioned above, and a few paragraphs from my *England Since Waterloo* (Eighth Edition: Methuen), and have also availed myself (with kind permission) of matter originally published in the Quarterly and Monthly Reviews. I append a list of the articles, on subjects cognate to those treated in the present work, contributed by me to those Reviews. The list will serve as a more specific acknowledgement to their proprietors and editors, and will also acquit me of any suspicion of having undertaken, without long and assiduous preparation, a task so ambitious as that discharged in these volumes. I must also acknowledge the courtesy of the Controller of H.M. Stationery Office in permitting the reproduction (notably in the Appendices) of much copyright material contained in Rules, Orders, Treasury Minutes, and other Official Publications. It is hardly necessary to add that the sole responsibility for statements of fact or opinion is mine alone.

I have appended numerous references to the text, mainly as a guide to students who may desire to probe more deeply than is possible in a general work into particular topics, and have also added a full and classified Bibliography which will, I trust, be similarly helpful. In it are, I hope, included all the works to which I am consciously indebted ; but in a work which has extended over a long period, and been exposed to many interrup-

tions (notably five Parliamentary Elections), there may be omissions. For any such omissions, and in particular for unacknowledged borrowings in the text of the work, if any there be, I crave pardon.

I also ask pardon if in this Preface I have entered into personal details unbecoming to an author. I have done so because I am gratefully aware that my previous works have gained me many friends—personally unknown to me—in different parts of the world. To them and to the men and women to whom at Oxford and elsewhere I have spoken of the matters contained in this book, these personal words are respectfully addressed.

J. A. R. MARRIOTT.

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## ERRATA

- Page 457, l. 13, *after when insert (1911)*  
" 457, l. 14, *after Balfour insert of Burleigh*  
" 475 (last line), *for Compton read Crompton*  
" 476, l. 1, *for Stevenson read Stephenson*  
" 587, l. 18, *for Esme read Esmé*

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BOOK I  
FORMS OF GOVERNMENT



## I. INTRODUCTORY

### *The State*

'La Grèce . . . a fondé dans toute l'étendue du terme l'humanisme rationnel et progressif. . . . Le cadre de la culture humaine créé par la Grèce est susceptible d'être indéfiniment élargi, mais il est complet dans ses parties. Le progrès consistera éternellement à développer ce que la Grèce a conçu, à remplir les desseins qu'elle a, si l'on peut s'exprimer ainsi, excellemment échantillonnés.'—RENAN.

'The State for the Greeks was from first to last an ethical institution, and it was a copy of the city of God of which the type is laid up in Heaven.'—DEAN INGE.

'The State is the divine idea as it exists on Earth . . . all the worth which the human being possesses, all the spiritual reality which he possesses, he possesses only through the State. . . . The existence of the State is the movement of God in the world.'—HEGEL.

'The State is "natural" (*φύσει*). . . . The impulse to political association is natural (*φύσει*) to man. . . . He who by nature and not by mere accident is State-less is either above humanity or below it. . . . Man, in his condition of complete development, is the noblest of animals; apart from law and justice he is the vilest of all. . . . The State was formed to make life possible; it exists to make life good.'—ARISTOTLE.

'The State is the complete union of free men who join themselves together for the purpose of enjoying law and for the sake of public welfare.'—GROTIUS.

'The State is merely a means with which man, the true end of the State, must never be satisfied.'—WILHELM VON HUMBOLDT.

THE State is the outstanding and characteristic phenomenon of the modern world. Intimate, not to say intrusive, as regards the daily life of the citizen, it is imposing in authority, and claims, if not omniscience, something approaching to omnipotence. The modern State, with its agents and regulations, dogs the footsteps of the individual literally from the cradle to the grave. Of birth, marriage, death the State demands to be made officially cognizant. Registration, certification, enumeration—these are required of the citizen at every turn in the wheel of life.

The  
modern  
State

With the mechanism of this majestic Institution, the machinery by which its innumerable functions are

Scope and  
purpose of  
this work

performed, the present work will be concerned. In particular it will attempt to analyse the operation of the machinery of State in England and in the British Commonwealth; to trace the development of English political institutions and to describe the main organs of English government. Only, however, by comparison with the institutions of other States, their working, and their history, can the peculiar characteristics of our own be adequately appreciated. While, therefore, English political institutions form the central theme of this book, frequent reference will be made to the institutions which have been evolved or adopted by other peoples of the modern world.

What is a  
State?

A preliminary question obtrudes itself: What do we mean by the State?

If the State is an imposing phenomenon, it is also a singularly complex conception, and we may achieve a better understanding of it if we clearly distinguish the term from other terms with which the State is not infrequently confounded.

Not necessarily  
a 'nation'

First: a State is not necessarily identical or co-extensive with a Nation. An attempt was made in the Peace Treaties of 1919 to bring the reconstructed states-system of modern Europe into conformity with the theory and the facts of 'Nationality'. The attempt was only partially successful; and naturally so, since the conception of the State is something distinct from the idea of the Nation, and much more definite. 'Nation' and nationality are singularly elusive terms and the attempt to analyse and define them has always presented great difficulties alike to the philosopher, to the jurist, and to the statesman.

Nation-  
ality

Vico defined nationality as 'a natural society of men who by unity of territory, of origin, of custom, and of language are drawn into a community of life and of social conscience'. But is unity of territory essential to the idea of nationality? Or even 'community of life'? If so, we must deny nationality to the Jews after their dis-

person, and to the Poles after the partition of their State. Is identity of language essential ; or of religion ? If so, we must refuse to recognize a Swiss nation, since the ' Swiss ' embrace three, if not four, creeds, and speak three, if not four, different languages. And is there no American nation ?

It is evident, then, that we shall involve ourselves in difficulties and contradictions if we lay overmuch emphasis either on community of religion or of language as an essential ingredient in the idea of nationality. Yet it would seem difficult in the absence of these ingredients to preserve nationality when it is divorced from state-hood. Swiss nationality and American nationality are respectively the resultant of a Swiss State and of an American State. In other cases the State may be due to the realization of common race, or common language, in a word, of nationality. The Triune Kingdom, commonly designated Jugo-Slavia, and the resuscitated Poland are apposite illustrations of the latter process. By exclusions and inclusions, therefore, we seem impelled to acceptance of some such definition as that suggested by Professor Henri Hauser of Dijon :

' La nationalité est un fait de conscience collectif, un vouloir-vivre collectif. . . . Race, religion, langue, tous ces éléments sont ou ne sont pas des facteurs de la nationalité suivant qu'ils entrent ou n'entrent pas à ce titre dans la conscience collective.' <sup>1</sup>

Will a ' collective consciousness ' suffice to constitute a Nationality ? A doubt obtrudes itself whether a collective consciousness could be generated without a sentimental or traditional attachment to a territorial home. To take a conspicuous illustration. Jewish nationality was sustained during two thousand years of exile mainly, no doubt, by devotion to a particular creed, partly by wonderful persistency and purity of blood, but not least by collective affection for the common home of the race : ' When I forget thee, O Jerusalem '. Except for the

<sup>1</sup> *Le Principe des Nationalités*, p. 7.



sentiment known as Zionism, modern Palestine would never have been called into being as a State by the Paris Conference. Similarly the Poles in dispersion drew their inspiration from and sustained their patriotism by the knowledge that many of their co-nationals were still living, though under alien rulers, on the plains of the Vistula.

A modern writer would seem, then, to get near the heart of the matter when he writes :

‘Nationality is more than a creed or a doctrine, or a code of conduct, it is an instinctive attachment ; it recalls an atmosphere of precious memories, of vanished parents and friends, of old customs, of reverence, of home, and a sense of the brief span of human life as a link between immemorial generations spreading backwards and forwards. . . . It implies a particular kind of corporate self-consciousness, peculiarly intimate, yet invested at the same time with a peculiar dignity . . . and it implies, secondly, a country, an actual strip of land associated with the nationality, a territorial centre where the flame of nationality is kept alight at the hearth-fire of home.’<sup>1</sup>

The same writer draws a series of instructive contrasts between Nationality and State-hood. ‘Nationality, like religion, is subjective ; State-hood is objective. Nationality is psychological ; State-hood political. Nationality is a condition of mind ; State-hood is a condition in law. Nationality is a spiritual possession ; State-hood an enforceable obligation. Nationality is a way of feeling, thinking, and living ; State-hood is a condition inseparable from all civilized ways of living.’<sup>2</sup>

A State then must not be confused, however much modern political practice may tend to co-extension, with a nation, still less with a race.

The State  
and the  
Govern-  
ment

Nor must we confound the terms State and Government. A Government of one kind or another is, plainly, essential to a well-ordered State ; a collection of individuals without a Government would be a mob. The Executive Govern-

<sup>1</sup> A. E. Zimmern, *Nationality and Government*, pp. 78, 84.

<sup>2</sup> *Ibid.*, p. 51.

ment is constantly called upon to speak and act on behalf of the State : with the unfortunate result that in common parlance we frequently use the one term when we mean the other. Thus, in reference to some enterprise or item of expenditure, we say that 'the Government will finance it', when we mean that the Administration acting on behalf of the whole community or State will for that purpose extract the money from the pockets of the taxpayers. Hence it is important to distinguish between the two terms.

A less common use of the term is as a synonym for a republican or non-monarchical form of Commonwealth. Thus Thomas Hobbes wrote : 'When Augustus Caesar changed the State into a monarchy'. And similarly Dryden :

Well Monarchys may own Religions name  
But States are atheists in their very frame.

But this use is virtually obsolete and need not detain us.

What, then, is a State ?

We may dismiss, for purposes of political definition, the State Invisible, however attractive the conception may have proved to mystical philosophers from Plato downwards. That a vision of the Eternal is essential to the well-being of the temporal State is assuredly true. It may further be conceded that the happiness and contentment of the mass of the citizens of a State will be in large measure proportionate to the degree in which they are in communion with the Invisible. For the Greek, Political Philosophy was interpenetrated with Ethics ; the State was for him, as one of the greatest of living philosophers has truly said, 'an ethical institution ; and it was a copy of the city of God of which the type is laid up in Heaven'.

The State  
Invisible

'To the Platonist', writes Dean Inge, ' . . . the actual reality of the Invisible State is independent of its realization on earth. It remains and always will remain the spiritual home of the good man, to which he can flee away and be at rest when he will. It is a sanctuary where God can hide him privily by His own presence from the provoking of all men,

and keep him secretly in His tabernacle from the strife of tongues.'<sup>1</sup>

None the less, although the Invisible State be to the mystical philosopher a spiritual reality, and although, as Plutarch said, a city might sooner subsist without a geographical site than without a belief in the Gods, yet the Invisible State is not a political reality. We have still to ask what the political reality which we describe as the State does, in fact, connote.

Aristotle's  
Theory of  
the State

Plato's theory of the State was, as we have learnt, mystical, though he himself refused to admit that it was Utopian, or impossible of realization. Yet it is, as he does admit, 'founded on words', and he frankly confesses that to him 'it is no matter whether his city exists or not'. For the most representative Greek thought on the subject of the State we must go, therefore, not to Plato, but to Aristotle.

Aristotle conceived of the State as an association or community (*κοινωνία*) which came naturally into existence to make life possible and which continues to enable man to live the highest life. The origin of the State must therefore be sought, not in law or convention (*νόμος*), but in nature (*φύσις*). The impulse to citizenship or political association is implanted in all men by nature, and only as a member of a political community can man achieve the highest of which he is capable. Nay, since the virtue of the individual is relative to and conditioned by the Polity to which he belongs, it is only in the perfect State that the individual can attain to the perfect life. Aristotle finds the proof of his proposition that the State 'is a creation of nature and prior to the family and the individual' in the fact that the individual, when isolated, is not self-sufficing, and therefore is like a part in relation to the whole. 'The man who is unable to live in society, or who has no need because he is sufficient for himself, must be either a beast or a God.'<sup>2</sup> Citizenship is not for him.

<sup>1</sup> *Outspoken Essays*, Series II, p. 91.

<sup>2</sup> *Politics*, i. 2.

Difficult as it is to the modern mind to accept this complete interdependence of Ethics and Politics, paradoxical as it seems to us to deny to the individual the possibility of living the highest life even under imperfect political conditions, we must nevertheless admit that the Aristotelian theory of the State does set a standard in Politics to which neither States nor individuals find it easy to attain. Moreover, the theory illustrates the problem as to the due relation between the rights and the duties of citizenship. It was, as Thomas Hill Green observed,

'because Plato and Aristotle conceived the life of the *πόλις* so clearly as the *τέλος* of the individual that they laid the foundation of all true theory of rights'. For 'Aristotle regards the State as a society of which the life is maintained by what its members do for the sake of maintaining it, by functions consciously fulfilled with reference to that end, and which in that sense imposes duties; and at the same time as a society from which its members derive the ability through education and protection to fulfil their several functions, and which in that sense confers rights.'<sup>1</sup>

It is imperative, however, to recall the fact that of a State in the sense in which the term is commonly understood in the modern world neither Plato nor Aristotle had any conception whatever. They had exclusively in mind the city-state typical of ancient Greece, a form of political organization most clearly exemplified for the modern world by one of the Swiss cantons such as Bern, with its capital city and circumjacent territory.

The ancient world, in fine, knew not the State, as we conceive it. Cities it knew, such as Athens and Sparta; great empires it knew, such as the Empires of Persia and of Macedon; but of the intermediate form—the nation-state—it was wholly ignorant.

The Middle Ages knew as little as the ancient world of the nation-state. The Roman Empire bequeathed to the Middle Ages the idea of a world-empire; but the execution of the terms of the bequest was complicated by the

The Middle Ages

<sup>1</sup> Green, *Political Obligations*, § 39.

appearance of a rival executor. In one aspect the Papacy was, as Hobbes pungently phrased it, 'the ghost of the Roman Empire sitting on the grave thereof'. But a great philosopher of our own time has conjectured that 'if Christ had never lived a spiritual Roman Empire not very unlike the Catholic Church would have appeared'.<sup>1</sup> Be that as it may, the legacy of Rome was divided, in very unequal proportions, between the Papacy, aiming at spiritual world-empire, and a revived Western Empire which in virtue of the patronage of the Pope was designated 'Holy'. Essentially, however, the Holy Roman Empire was little more than an elected German kingship exercising jurisdiction none too effective over the German princes and even less effective over Burgundy and the cities and principalities of Italy. Long before its actual dissolution (1806) at the dictation of Napoleon that somewhat mysterious institution had, in Voltaire's mordant phrase, ceased to be either Holy or Roman or an Empire.

Dante's  
Vision  
of the  
Empire

Yet it existed; and the greatest genius of the Middle Ages attempted to give substance to the shadow. Dante's concern was primarily for an Italy distracted by the endless strife of cities and princes; but his vision went beyond the bounds of Italy. To the great Ghibelline poet it seemed clear that in its temporal mission the Papacy had lamentably failed. But where Pope had failed, might not Emperor succeed? The *De Monarchia* presents an elaborate argument for an Empire or world-power. The Empire, no less than the Catholic Church, was ordained of God; both were dependent upon God; each was in its peculiar sphere supreme; the supreme pontiff in the spiritual sphere was ordained 'to lead the human race in accordance with revelation to life eternal'; the Emperor, in the secular sphere, was ordained to guide humanity to temporal felicity in accordance with the teaching of philosophy.

Such, in brief, is the argument of Dante's famous

<sup>1</sup> Inge, *op. cit.*, p. 99.

treatise. In his scheme there was no room for the nation-state; hardly for the city-state, or the independent feudal principality. Yet the feudal principality shared with the Empire and the Papacy practical dominion until near the close of the fifteenth century. Not, indeed, until the oecumenical pretensions of the Catholic Church were restricted by the Protestant Reformation; not until the division of Germany between two, if not three, rival creeds had still further reduced the effective power of the German King who still bore the proud title of Roman Emperor; not until the disintegrating forces of feudalism had been subdued by the rising power of centralizing monarchies could the nation-state, as the modern world knows it, finally emerge.

Poland, Hungary, and Bohemia had, indeed, for some time past shared with England the dignity of state-hood. Among the States of Western Europe France was (after England) the first to achieve national unity and self-conscious identity. A succession of remarkably able kings of the Capet and Valois dynasties; the absorption by conquest or marriage of the great feudal duchies and counties; frontiers well defined on three sides by mountain ranges, the ocean, and the channel, but highly debatable on the fourth side; an administrative system ever increasing in efficiency as it increased in centralization; the Hundred Years War against the Angevin Kings of England and the Dukes of Burgundy—all these factors contributed to the making of modern France; and by the end of the fifteenth century France was made.

The  
nation-  
state

By a process parallel though not identical Spain reached a similar stage of national evolution early in the sixteenth century. The contest between Spain and the seven northern provinces of the Netherlands gave to the latter sufficient cohesion and self-consciousness to entitle them to be regarded as a nation-state from the end of the sixteenth century.

Austria emerged from the devastating ruin of the Thirty Years War a State; though its dynastic con-

nexion with the Czech kingdom of Bohemia and the Magyar kingdom of Hungary, to say nothing of its own conglomeration of races, denied to it the attributes of a 'nation'. Prussia was manufactured into a State by the genius of its Hohenzollern rulers in the seventeenth and eighteenth centuries. Russia, though more loosely compacted, must be counted among nation-states from the reign of Peter the Great. Portugal had regained its independence in 1640, while from the dissolution of the union of Calmar (1523) Sweden had played an influential part in the politics of Northern Europe.

The nineteenth century witnessed the birth of Belgium (1830); of Greece in the same year, and later of other Balkan States; of Switzerland, and most imposing of all, of modern Italy and modern Germany. The last two owed much, Switzerland, and perhaps Jugo-Slavia, owed something, to the first Napoleon. The importance of his work as the maker of nations has indeed been under-estimated; but this is not the place for a correction of the balance.

America Meanwhile, a great nation-state, though of an unfamiliar type, had before the close of the eighteenth century come to the birth on the American continent, and early in the nineteenth century the dissolution of the Spanish and Portuguese Empires opened the way for the creation of several nation-states in South America.<sup>1</sup>

The British Dominions The position of the British Dominions is somewhat more ambiguous. While loyal to the British flag they have evidently attained to nation-hood; can they accurately be described as States?

To that question we must return. Meanwhile this survey, though of necessity rapid and incomplete, has brought us back to the question from which we started, and may, incidentally, have helped towards an answer.

What do we mean by a State?

Definitions Aristotle defined the State as 'the association of clans

<sup>1</sup> Cf. *The National Spirit in the Modern World*, an essay which I contributed to *Peoples of All Nations* (Harmsworth), and from which, in the preceding paragraphs, I have borrowed.

and village-communities in a complete and self-sufficing life'. Hugo Grotius defined it as 'the complete union of free men who join themselves together for the purpose of enjoying law and for the sake of public welfare'.

Of Aristotle's conception of the State something has already been said; the definition of Grotius seems so far to recall the ideas of Aristotle in that the State is defined by its end (*τέλος*)—public welfare. Further, by insisting that it must be a voluntary union of free men, he comes near to identifying the State with the particular form of it distinguished, as we saw, by Hobbes and Dryden. Strictly interpreted, his definition would seem to exclude from the category of States any which did not more or less conform to the 'constitutional' or democratic type. But this would seem to be unnecessarily narrowing. Sir John Seeley defined a State as 'a political aggregate held together by the principle of government'; but here as also in the definition of Hobbes we miss any reference to a definite territory. Dr. Matthew Arnold introduced another element: 'The State is properly . . . the nation in its collective and corporate capacity.' Hegel set the fashion in Germany of deifying the State: 'The State is the divine will as the present Spirit unfolding itself to the actual shape and organisation of a world . . . It is the ultimate end which has the highest right against the individual.' Nor have his countrymen been slow to follow the fashion he set. Thus the text of *Die Politik* of Treitschke is: 'The State is Power.' That the State 'has no superior on earth' had indeed become the common creed of Imperial Germany. Bluntschli, however, was less apostrophic and more scientific in his definition of the State as 'a combination or association of men, in the form of Government and governed, on a definite territory, united together into a moral, organized, masculine personality'. On this definition, apart from its cumbrous language, it would not be easy to improve, though Mr. Woodrow Wilson's has the merit of brevity: 'A State is a people organised for law within a definite territory.'



From these definitions, which are evidently typical rather than exhaustive, certain conditions essential to state-hood seem clearly to emerge. A State implies a defined territory ; without a defined territory an aggregation of people may constitute a nation, but they cannot form a State. It implies an ordered and permanent Government, served by regular officials and in a position to command the services and the contributions of its subjects in order to perform the elementary functions of government : the protection of its borders and its people from external attack and the maintenance of order at home. It implies, further, laws, rules, or regulations which the governors and the governed alike accept. Finally it implies a body of men and women, conscious of a certain community of interests, anxious to enjoy the rights and willing to fulfil the obligations of citizenship.

Object of  
this book

With the State, as thus understood, the present work will deal ; but only, as indicated above, with a particular aspect of the State ; with the art or practice more than with the science or theory of Government. Already there exists a vast literature dealing with Political Theory and with the functions of the State : the literature which deals with the mechanism of the State is comparatively scanty. It is therefore to the latter subject that this book is intended to make its modest and severely restricted contribution.

Its  
method

The method pursued in this book will be that which in other branches of learning is known as the comparative method. Political Science in England has tended overmuch, like other things English, to insularity. It is a truism to say that in no two countries are political conditions identical, and in the discussion of political problems it is always prudent to take account of environment. But so large a part of the world has, for good or ill, accepted the fundamental principles of Democracy, so manifestly are those principles beginning to influence peoples which for long centuries have been dominated by other ideas, that the time seems not inopportune to

attempt, in the light of accumulating experience, a comparative treatment of some of the constitutional problems by which the citizen-rulers of these democratic Commonwealths are, with increasing insistence, perplexed.

For such a survey the moment would seem to be peculiarly opportune. The root principles of Democracy have been generally accepted; but the principle has worked out in diverse forms, and one type of Democracy differs widely from another. Moreover, in many States political institutions are now subject to a process of exceptionally rapid transformation, and in some, if not in all, the principle of Representative Democracy is definitely challenged. Should that principle fail to justify itself we may anticipate, in the near or distant future, a profound modification in the type of government now prevalent. But, even should there be no fundamental modification in the general outline of government, the influences, in part philosophical, in part practical, which are contributing to the prevailing dissatisfaction can hardly fail to affect the existing mechanism of the State. Theory and practice are to-day more closely conjoined than in any recent period of world-history. They have never perhaps been severally so self-contained as Englishmen have been apt to suppose. Impatience of philosophical theory has been, in the past, the characteristic, if not of English politics, at least of English politicians and of English jurists.

Democracy and Democracies

To illustrate this thesis—a commonplace of historical criticism—we need only compare Blackstone's *Commentaries* with Montesquieu's *Esprit des Lois*, Burke's *Reflections on the French Revolution* with Rousseau's *Contrat Social*, or, perhaps more fairly, Lord Bryce's description of the *American Commonwealth* with De Tocqueville's study of *Democracy in America*. The concreteness of the English intellect only reflects the peculiar course of political development in England. Constitutional changes have been effected in this country not in deference to political theory but under the pressure of practical

grievances. The denial of the right of personal liberty to five recalcitrant knights ; the attempt to levy, without the authority of Parliament, an imposition upon John Hampden ; the necessity of raising an annual force to suppress an Irish insurrection—these were the immediate antecedents of the Great Rebellion. O'Connell's election for County Clare procured the repeal of the Test Act and the final emancipation of the Roman Catholics. This is the English mode and it reflects the English temper.

Other peoples have been more deferential to theory ; and there is some ground for the belief that even in England the influence of abstractions upon political conduct has of late become more powerful than it had hitherto been. Those who lack both experience of affairs and a knowledge of the past are prone to be captured by phrases and to become the slaves of *formulae*. Events now move with a rapidity which leaves little leisure for reflection, and the dissemination of news does not necessarily guarantee the formation of sound opinions. A formula constantly reiterated and tenaciously adopted may serve, therefore, as an easy substitute for personal investigation and independent judgement.

The aim of the present work is then essentially concrete. It will deal less with functions than with machinery ; more with historical facts than with Political Theory.

Plan of  
the work

After a brief consideration of constitutional forms and categories, I propose to proceed to a rapid analysis of the political institutions of three typical Democracies ; of Athens as illustrating the working of Direct Democracy ; of the Helvetic Confederation which, besides affording one of the best examples of a Federal State, has evolved a type of Democracy most nearly akin to the Direct Democracy of a city-state, a type which we may label as Referendal ; and of the United States of America which is both Federal and distinctively Presidential. These chapters must be regarded as introductory, being intended mainly to avoid unnecessary repetition in later stages of the work, though in a work which is partly historical

and partly analytical, some repetition can hardly be avoided.

Book III will be devoted to an examination, in some detail, of the salient characteristics of English Political Institutions, and the historical development of that species of Democracy to which the label of Responsible Government has been attached, alike in Great Britain and in the Oversea Dominions of the British Crown.

Finally we shall proceed to an analysis of the main organs of government, central and local, primarily with reference to England, but not without frequent glances at the working of parallel institutions in other typical States of the modern world. The comparative anatomy of the structure of the State is indeed the central subject under investigation in this book. The method which it is proposed to adopt is less critical than analytical; but criticism is hardly separable from analysis, especially if the analysis be comparative. One pledge, however, I can give. Criticism, if unavoidable, will always be tempered by the caution begotten of long experience in exposition. No student to whom it has fallen to expound to foreigners the intricacies of the unwritten Constitution of England, or to analyse for the benefit of Englishmen the Constitutions of foreign States, can fail to appreciate the difficulties and dangers which lurk in both paths. Baffled by the absence of a Constitutional Code in England, foreign jurists have, perhaps wisely, shrunk from the exposition of a Constitution which as De Tocqueville complained 'does not exist'. Englishmen may be lured into the greater danger of supposing that they can apprehend the working of foreign Constitutions by a study of texts. I have not been unmindful of this danger, but whether I have successfully avoided the pitfalls only foreign jurists can tell. Let them, however, be assured, that where I have ventured to invade their preserves, it has been primarily for the purpose of elucidating the mechanism not of their Government but of our own. Only, however, by the application of the comparative

method to Political Science can any conclusions of real value be drawn, or any real apprehension of the working of Institutions be attained. 'What does he know of England who only England knows?' Who can appreciate the mechanism of the English Government, whose knowledge of political machinery extends no farther than the institutions evolved in England, and accepted, not without important modification, by the British Dominions beyond the Sea?

To expound the working of English Political Institutions, but to do this with constant reference to the political machinery of other typical States of the modern world, is then the task which, in the following pages, I have essayed.

## II. FORMS OF GOVERNMENT

### *The Classification of States*

'A constitution is the arrangement of offices in a state, especially of the highest of all. The government is everywhere sovereign in the state and the constitution is in fact the government . . . the supreme power must be vested either in an individual, or in the few, or in the many.'—ARISTOTLE, *Politics*, iii. 6, 7.

'Constitution signifies the arrangement and distribution of the sovereign power in the community, or the *form* of the government.'—SIR CORNEWALL LEWIS.

'In every practical undertaking by a state we must regard as the most powerful agent for success or failure the form of its constitution.'—POLYBIUS, *Histories*, vi. 1.

THE English people admittedly possess a genius for government which is second only, if it be second, to that of the Romans. In this sense they are in the highest degree political—apt for the discharge of the duties of citizenship. Like the Romans, however, they have little disposition towards political introspection. They have exhibited, in unique measure, a capacity for self-government; they have been successful, beyond most, in the government of other peoples; but confronted with a demand for an analysis of their methods, they have shown themselves to be less ready and capable; their instinct, in fine, tends rather to practice than to speculation.

English  
impa-  
tience of  
political  
analysis

For subtle analysis in the science of politics we turn to the ancient Greek; for painstaking research, for persistent exercises in the comparative method, we turn among the moderns to the American. In politics, as in other spheres of activity, the average Englishman is content to do a thing, and leave others to explain, if they can, how it is done. Pope embodied in a familiar epigrammatic couplet the prevalent temper of his countrymen:

For forms of government let fools contest,  
Whate'er is best administered is best.

Like most epigrams, Pope's contained a half-truth. It is true, in more homely phrase, that the proof of the political pudding is in the eating. Logical precision will not atone for practical incompetence. The more perfect the form of a Constitution, the less successful it often proves to be in actual operation. Had it been otherwise, the name of the Abbé Sieyès, instead of being a byword for contemptible incompetence, would be honoured among the greatest of political architects.

Yet the importance of correct analysis and scientific classification will hardly be denied. Loose thinking, even in politics, is apt to engender careless administration. Imperfections of style, if an athletic analogy be permitted, matter little so long as physical powers are at their highest; an outstanding genius may at all times disregard them. But the moment the muscles begin to stiffen, or sight grows a trifle more dim, youthful neglect of form exacts a disproportionate penalty. So is it both in the art of government and in the sphere of industry. As long as all goes well, before competition becomes severe, the rule of thumb may suffice; as conditions become more exacting and competitors multiply, results, even approximately equal, can be secured only by recourse to more scientific methods, by the generous use of fertilizers and the constant application of fresh capital. In the language of the economist, the stage of diminishing returns is sooner or later, yet inevitably, reached. But no sooner do we realize the need for precise thinking in politics than we turn instinctively to the Greeks and in particular to Aristotle.

The terminology of politics

Nor is the reason far to seek. From Aristotle Political Science has derived alike its method and its terminology; from him it still draws much of its vital inspiration. Aristotle occupies, indeed, a unique place in the development of the theory of the State. Writing at the close of a great epoch in the history of mankind, he was able to survey a wide field of human experience, and from his survey to draw conclusions of permanent value to the

seeker after political truth. The day of the autonomous city-state of Greece was over, and Aristotle's was the last word in Greek political philosophy. The decay of the city-state and the oncoming of the world-empire were alike so rapid that Aristotle writing in the fourth century B.C. was probably unconscious of the imminent change. His observations, taken before the symptoms of decay were palpable, possess therefore unique significance.

Happy in his time, Aristotle enjoyed other advantages. Ancient Greece was as opulent in the variety of political phenomena as it was fortunate in their simplicity. There were hundreds of city-states, each with its distinctive *êthos*, its dominant principle of government, its own inspiring spirit. But the variety of phenomena was not more remarkable than their relative simplicity. To this feature of Greek politics further reference will be made in the next chapter.

Greek  
politics

Relieved of many anxious questions that obtrude themselves upon the modern citizen, alike in the sphere of religion and in that of Economics, the Greek could devote himself wholeheartedly to politics, and thus Aristotle could with accuracy insist that 'man is a being designed by nature for citizenship'. To critics absorbed in the affairs of the modern world the aphorism may appear to be exaggerated, perhaps even false, and certainly both inadequate and misleading. Yet the phrase embodies, as no other single phrase does, the characteristic attitude of the Greek towards the theory and practice of politics. So closely did the Greek identify the well-being of the citizen with the well-being of the State, the health of the individual with that of the body politic, that he could not conceive of them apart. Man, such is Aristotle's contention, cannot fulfil his manifest destiny except as a member of a political community. The teleological principle, however different the application, is not less familiar to students of St. Paul than to students of Aristotle. Just as, in Pauline phrase, the Christian 'fulfils himself'—accomplishes his purpose—in Christ, so in Aristotelian phrase



the 'political animal'—the being whose 'end' (τέλος) is the State—cannot, except as a member of a State, accomplish the purpose for which he came into the world.

The form  
of the  
State

Aristotle, with inexorable logic, carries the argument even farther. The form of the State was, in his view, of supreme importance to the moral life of the individual citizen. Since the State exists in order to enable the individual to live the highest life of which man is capable, so 'the virtue of the citizen must be relative to the Polity'. A defect in the Constitution reacted unfavourably upon the life of the citizen. To attain to the highest 'virtue'—the term in Greek is much more comprehensive than in English—man must live under an ideal Constitution. The State being 'prior to the individual', the health of the 'member' must be dependent upon the health of the whole body politic.

The identity  
of  
the State

This identification explains the anxiety of the Greek as to the form of government. The Constitution was to the State as the soul to the body. More than that: the Constitution was the State. Hence any alteration of the Constitution fatally impaired the identity of the State. It was not with the Greeks a question of identity of territory or even of population.

'It would', says Aristotle, 'be a very superficial view which considered only the place and the inhabitants; for the soil and the inhabitants may be separated, and some of the inhabitants may live in one place and some in another. . . . Since the State is a community of citizens united in sharing one form of government, when the form of the government changes and becomes different, then it may be supposed that the State is no longer the same, just as a tragic differs from a comic chorus though the members of both may be identical.'<sup>1</sup>

The modern view is characteristically different. Identity is territorial not constitutional. France, for example, did not suffer any loss of identity in 1792 in consequence of the fundamental change in the form of government; nor in 1805; nor in 1814; nor in 1815; nor in 1830;

<sup>1</sup> *Politics*, iii. 3.

nor in 1848 ; nor in 1852 ; nor in 1870. Debts are held to attach to territories, not to governments : consequently when Venetia passed from Austria to Italy, Italy became responsible for a portion of the Austrian debt. The Greek view was much less material. Each State had its own distinctive *êthos*, which not only impressed itself upon the character of the individual citizen, but demanded its appropriate type of education. ' That which most contributes to the permanence of constitutions is the adaptation of education to the form of government.'

The point is so admirably brought out by the greatest of Aristotelian commentators that it is permissible to quote the passage in full : <sup>1</sup>

' To Plato and Aristotle', writes Mr. Newman, ' the constitution is a powerful influence for good or evil : it is only in the best State, says the latter, that the virtue of the good man and the virtue of the citizen coincide, whence it follows that constitutions other than the best require for their maintenance some other kind of virtue than that of the good man. In the vaster States of to-day opinion and manners are slower to reflect the tendency of the constitution : in the small city-states of ancient Greece they readily took its colour. It was thus that in the view of the Greeks every constitution had an accompanying *êthos*, which made itself felt in all the relations of life. Each constitutional form exercised a moulding influence on virtue ; the good citizen was a different being in an oligarchy, a democracy, and an aristocracy. Each constitution embodied a scheme of life, and tended, consciously or not, to bring the lives of those living under it into harmony with its particular scheme.'

The modern critic may hesitate, for obvious reasons, to accept, in a form so uncompromising, the Greek view as to the independence of Ethics and Politics, their insistence upon the close relation between the form of the Constitution and the character of the individual citizen. Yet it is easy to perceive the ennobling influence which in the best minds it exerted upon the whole conception of Politics

<sup>1</sup> F. W. Newman, *The Politics of Aristotle*, i. 209.

and upon the performance of public duties. Of the actual conditions of government in the Greek city-states something will be said hereafter. The philosophical conception of the State is a topic which, fascinating though it be, is too remote from the concrete problems with which this book is concerned to be permitted to detain us.

So much, however, has seemed necessary in order to explain the importance attached by Greek thinkers to the form of the government and the classification of constitutions. To that subject we now pass.

Aristotle's  
classifica-  
tion of  
States

In the demarcation of his political categories Aristotle started from the conception of Sovereignty. In every State there is a supreme organ in which power is concentrated and to which all other organs are subordinate. 'The supreme power', he says, 'must be vested either in an individual, or in the few, or in the many.' But to this purely quantitative basis of classification he was quick to add a qualitative *differentia*. The numerical principle must be corrected by an ethical standard. That standard is found in concern for the good of the community. The 'one' may rule either for the common good or for his own personal advantage; the 'few' or the 'many' may equally have regard primarily to their own class interests or to those of the State. Personal rule may be either selfish or altruistic; in the former case it is a Tyranny; in the latter a Monarchy (*βασιλεία*). Similarly, an Aristocracy is the rule of a minority exercised for the best interests of the State, while the rule of a few aiming at the promotion of their class interests is an Oligarchy. The term Democracy having in Aristotle's day become discredited by the degeneration of the Greek cities, he applied it to the arbitrary rule of the many, while he described the unselfish rule of the masses as a Polity. Constitutions, therefore, were divided into two classes: (i) normal constitutions (*δρθαί*); and (ii) deviation-forms, corruptions, perversion (*παρεκβάσεις*). As Tyranny is the perversion of Kingship, so is Oligarchy of Aristocracy, and Democracy of Polity.

A difficulty, however, suggests itself. ✓ How shall we classify a Constitution in which the rich ruling in the interests of the rich are in a majority, or the poor ruling in the interests of the poor are in a minority? Are we to have regard primarily to numbers or to wealth? Aristotle finally decides that the question of numbers is accidental, that of wealth is the essential point. Oligarchy, therefore, is the rule of the rich, ruling in the interests of the rich, be they few or many. Democracy is the rule of the poor, be they many or few, ruling in the interests of the poor. To the modern critic the discussion may seem tiresome and even otiose, yet one of the greatest of Aristotelian commentators takes assuredly a correct view of the matter.

'The principle of classification', says Mr. Newman, 'adopted by Plato and Aristotle has the merit of directing attention to the *ἦθος* and aim of constitutions as distinguished from their letter: we learn from it to read the character of a State, not in the number of its rulers, but in its dominant principle, in the attribute—be it wealth, birth, virtue, or numbers, or a combination of two or more of these—to which it awards supreme authority, and ultimately in the structure of its social system and the mutual relation of its various social elements. If they erred in their principle of classification, it was from a wish to get to the heart of the matter.'<sup>1</sup>

Aristotle defined the terminology of Political Science for many centuries. The Romans, with all their genius for government, made but a meagre contribution to Political Theory.

Polybius did indeed include in his *Histories* a brilliant disquisition on the Roman Constitution; but Polybius was a Greek. The difficulty of analysis was, as he complained, increased not merely by the fact that he was a foreigner, but also by the intrinsic complexity of his subject. These obstacles were, however, so successfully surmounted that the chapters devoted to this subject are perhaps the most arresting in his whole work, and, with

Polybius  
on the  
classifica-  
tion of  
States

<sup>1</sup> Newman, *Politics*, i. 2, 25.

all respect to Mommsen, have stood remarkably well the tests imposed by the higher criticism.

Incidentally Polybius discusses the classification of politics.

'It is undoubtedly the case', he writes, 'that most of those who profess to give us authoritative instruction on this subject distinguish three kinds of constitution, which they designate *kingship, aristocracy, democracy*. But in my opinion the question might fairly be put to them, whether they name these as being the *only* ones or the *best*. In either case I think they are wrong. For it is plain that we must regard as the *best* constitution that which partakes of all three elements. . . . Nor can we admit that these are the *only* forms; for we have had before now examples of absolute and tyrannical forms of government, which, while differing as widely as possible from kingship, yet appear to have some points of resemblance to it; on which account all absolute rulers falsely assume and use, as far as they can, the title of king. Again, there have been many instances of oligarchical governments having in appearance some analogy to aristocracies, which are, if I may say so, as different from them as it is possible to be.'<sup>1</sup>

Upon the classification preferred by Polybius himself Aristotle's influence is evident. The numerical *differentia* will not, by itself, suffice. The rule of one may be held to be a kingship only when his rule 'is accepted voluntarily and is directed by an appeal to reason rather than to fear and force'. Otherwise it is a *despotism*. Nor can every oligarchy be properly described as an aristocracy, but only where 'the power is wielded by the justest and wisest men selected on their merits'. Similarly the rule of the many may easily become nothing but *mob-rule*; the honourable designation of a democracy must be reserved for a government where 'reverence to the gods, succour of parents, respect to elders, obedience to laws are traditional and habitual'. Such communities, if the will of the majority prevail, are rightly spoken of as democracies; but it is not enough to constitute a demo-

<sup>1</sup> *Histories*, vi. 3.

cracy that 'the whole crowd of citizens should have the right to do whatever they wish or propose'.

The criticism of Polybius is as pertinent as it is sound. Cicero in his Treatise on the State appears to claim originality for his analysis of a mixed form of government, and, in a passage of doubtful authenticity, accords to that form the palm of superiority, holding that 'the best form of government is a moderate mixture of royalty, nobility and democracy'. In fact, however, Cicero was merely following the lead of Polybius. Tacitus, on the other hand, though ready to pay tribute to the theoretical merits of a 'mixed' form of government, categorically denies its superiority in practice. 'All nations and cities', he writes, 'are ruled either by the people, or the nobles, or a single person: a form of commonwealth selected and combined from all these kinds is more easily praised than evolved, or if evolved, is not likely to endure.'<sup>1</sup>

Save for these exceptions there is little to detain the student of Political Theory between the decline of the Greek city-state and the revival of Greek learning in the Renaissance. The Middle Ages, as Lord Bryce justly remarked, were essentially unpolitical. The interval is, however, partially broken by two works which, despite the eminence of their authors, make little effective contribution to Political Science. Dante's *De Monarchia*, inspired by the distracted condition of Italian politics, was, as we have seen, an elaborate argument in favour of the restoration of the world-empire of Rome. The *De Regimine Principum* of Thomas Aquinas is on a somewhat different plane. Aquinas was as much an apologist for the Papacy as was Dante for the Empire. None the less his work is truly representative of the Middle Ages. As a French critic has said: 'it summarizes the Middle Ages, nay it is the Middle Ages; there you have collected, apparently for ever, all that the Middle Ages thought, and knew.'<sup>2</sup> It is more to our present purpose to observe that the *De*

Cicero and  
Tacitus

The  
Middle  
Ages

Dante and  
Aquinas

<sup>1</sup> Tacitus, *Annals*, Bk. IV, c. 33.

<sup>2</sup> Paul Janet, *Histoire de la Science politique*, i. 399.

*Regimine* contains a renewed attempt at classification. In the earlier books of his treatise Aquinas endeavours to reconcile Aristotle and St. Augustine, treating the one as the highest exponent of purely human reason, the other as the apologist of Christian doctrine. Following in general the Aristotelian classification, particularly in regard to normal and perverted forms, Aquinas differs from him in holding Monarchy to be the best form of Polity. 'The chief good of Society', he says, 'is that its unity be preserved which is called peace'; and this unity, he contends, is most likely to be preserved 'by that which is itself a unit'.

Sir John  
Fortescue

The last two books of the *De Regimine* are commonly regarded as spurious, the product of a hand later than that of Aquinas. But spurious or not, they possess for the student of English political thought a special interest. From them Sir John Fortescue would seem to have derived the categories set forth in his *Governance of England*. Fortescue, following the later classification of the *De Regimine*, differentiates the forms of government as follows: (i) *Dominium Regale* or absolute monarchy; (ii) *Dominium Politicum* or republican government; and (iii) *Dominium Politicum et Regale*, a combination of the two, resulting in a constitutional monarchy. The difference between the first and the third forms lies mainly, he insists, in the fact that 'in the latter the subjects are not bound to obey any laws or pay any taxes to which they have not given their consent'. To this latter category, Fortescue contends, the English Constitution belongs. Thus in the *De Laudibus Legum Angliæ* he writes:

'A King of England cannot at his pleasure make any alterations in the laws of the land, for the nature of his government is not only legal but political. . . . He can neither make any alteration or change in the laws of the realm without the consent of the subjects nor burden them against their wills with strange impositions, so that a people governed by such laws as are made by their own consent and approbation

enjoy their properties securely and without the hazard of being deprived of them either by the King or any other. . . . For he is appointed to protect his subjects in their lives, properties, and laws ; for this very end and purpose he has the delegation of power from the people and he has no just claim to any other power but this.'

Sir John Fortescue, the exponent of Lancastrian ' Constitutionalism ', stood in the strict line of juristic apostolical succession. His words, written in the middle of the fifteenth century, re-echo those of Bracton, the great jurist of the thirteenth :

' Rex autem habet superiorem, Deum scilicet ; item legem per quam factus est rex ; item curiam suam, videlicet comites, barones, quia comites dicuntur quasi socii regis, et qui habet socium habet magistrum : et ideo si rex fuerit sine fraeno, id est sine lege, debent ei fraenum ponere, nisi ipsimet fuerint cum rege sine fraeno.'

As Fortescue echoes Bracton, so he anticipates the language of Sir Thomas Smith. The latter was writing, be it noted, at the zenith of the Tudor dictatorship :

' The most high and absolute power of the realm of England consisteth in the Parliament. . . . The Parliament abrogateth old laws, maketh new, giveth order for things past and for things hereafter to be followed, changeth rights and possessions of private men, legitimateth bastards, establisheth forms of religion, altereth weights and measures, giveth forms of succession to the Crown, defineth of doubtful rights whereof is no law already made, appointeth subsidies, tailles, taxes and impositions, giveth most free pardons and absolutions, restoreth in blood and name, as the highest court, condemneth or absolveth them whom the prince will put to that trial. And to be short, all that ever the people of Rome might do, either in *centuriatis comitiis* or *tributis*, the same may be done by the Parliament of England, which representeth and hath the power of the whole realm, both the head and the body. For every Englishman is intended to be there present, either in person or by procuration and attorney, . . . from the prince (be he king or queen) to the lowest person of England. And the consent of the parliament is taken to be every man's consent. . . .'

Sir  
Thomas  
Smith



Hooker The language of the great jurist is endorsed by that of the philosopher-ecclesiastic. 'Lex facit regem', writes the 'judicious' Hooker; 'the king's grant of any favour made contrary to the law is void; what power the king hath he hath it by law, the bounds and limits of it are known.' In constitutional doctrine there is, therefore, unbroken continuity; but it is not until the publication of the *Leviathan* (1651) that the attempt to obtain a scientific basis of classification is renewed. Hobbes, like Aristotle, starts from the theory of Sovereignty, but, unlike Aristotle, he declares unequivocally for the simple numerical *differentia*:

Thomas  
Hobbes of  
Malmes-  
bury

'The difference of Commonwealths', he writes, 'consisteth in the difference of the Sovereign or the Person representative of all and everyone of the multitude. And because the Sovereignty is either in one Man, or in an assembly of more than one; and into that assembly either Every man hath right to enter, or not everyone, but Certain men distinguished from the rest; it is manifest there can be but Three kinds of Commonwealth. For the Representative must needs be One man or more; and if more then it is the Assembly of all, or but of a part. When the Representative is one man then is the Commonwealth a Monarchy; when an assembly of all that will come together, then it is a Democracy or Popular Commonwealth: when an Assembly of a part only, then it is called an Aristocracy. Other kind of Commonwealth there can be none: for either One or more or all must have the Sovereign power (which I have shown to be indivisible) entire.'

Of Aristotle's deviation forms or perversions Hobbes will have none:

'There be other names of Government', he writes, 'in the Histories and books of Policy; as Tyranny and Oligarchy: but they are not the names of other forms of Government, but of the same formes *misliked*. For they that are discontented under Monarchy call it Tyranny; and they that are displeased with Aristocracy call it Oligarchy; so also they which find themselves grieved under a Democracy call it Anarchy (which signifies want of Government): and yet I think (he adds) no man believes that want of Government is any new kind of Government; nor by the same reason

ought they to believe that the Government is of one kind when they like it and another when they dislike it, or are oppressed by the Governors.' <sup>1</sup>

Other supposed varieties of the three normal forms, as for instance elective monarchy, are really due, so Hobbes contends, to loose thinking. An elected king, if he has the right to nominate a successor, is virtually hereditary ; if he has not the right, he is not Sovereign. Sovereignty would in 'that case reside with those who have the right to elect the successor'. Similarly in regard to so-called 'limited Monarchy', the Sovereignty resides not in the Monarchy, but in the Assembly, be it democratic or aristocratic, which imposes the limitation. Hobbes, therefore, is at one with Rousseau in holding that though power may be delegated, Sovereignty is indivisible, and, with one qualification, irresponsible. The Sovereign must, he admits, submit to the law of nature ; that is, he must fulfil the purpose for which the State exists and provide for the peace and security of the people. 'The difference between these three kinds of Commonwealth consisteth not in the difference of Power, but in the difference of Convenience or aptitude to produce the peace and security of the people for which end they were instituted.' <sup>2</sup> And of these three kinds of Commonwealth which best attains the supreme end of Government ?

Without hesitation Hobbes answers 'Monarchy'. There are inconveniences attaching to this as to all forms of government ; a subject, for instance, may be arbitrarily deprived of all his property for the enrichment of some favourite or flatterer. But Assemblies, both Aristocratic and Democratic, are open to the same objection and greater. For while a monarch has but few favourites, an assembly has many ; and the subject will suffer the degradation not of one man or a few, but of many. Again, it is inconvenient when the Sovereignty descends upon an infant or an idiot. There is apt to be a struggle for the Guardianship or Protectorate ; but this

<sup>1</sup> *Leviathan*, c. xix.

<sup>2</sup> *Ibid.*

difficulty is in a Monarchy only exceptional; in an Assembly it is normal, Assemblies being constantly exposed to the danger of party factions and disputes.

On the other hand, Monarchy has advantages which are all its own. First: in Monarchies private and public interests coincide: 'The riches, power, and honour of a Monarch arise only from the riches, strength, and reputation of his subjects. For no king can be rich nor glorious nor secure; whose subjects are either poor, or contemptible, or too weak through want or dissension to maintain a war against their enemies.' In the other two forms the private interests of a corrupt or ambitious statesman often runs counter to the welfare of the State. Secondly: a king can always command the best advice and can obtain it in confidence. An assembly acts on advice of silver-tongued orators. Thirdly: a king is less inconstant than a shifting assembly, and is likely therefore to pursue a steadier and more consistent policy. Fourthly: 'a monarch cannot disagree with himself out of envy or interest; but an assembly may; and that to such a height as may produce a civil war.' The *Leviathan* was, in one sense, a *livre de circonstance*. Hobbes's views are manifestly coloured, indeed inspired, by the chaotic condition of the country at the time at which he wrote. He looked to the strong hand of a Protector, not yet proclaimed, to redeem it. Still, whatever permanent value may attach to his conclusions, no other English philosopher has been at equal pains to analyse the 'different kinds of Commonwealth', or to discuss in so much detail the problem, which to the Greeks appeared of super-eminent significance, as to the form of the State.

Locke If Hobbes is the apologist of absolute Sovereignty, whether exercised by hereditary Monarch or by Protector, Locke is the purveyor of political philosophy to the Whig aristocracy of the eighteenth century. He provided, perhaps superfluously, a philosophical apology for the Revolution of 1688, and the strictly limited monarchy which ultimately emerged therefrom. Ac-

According to Locke the true basis for the classification of States is to be found in the position of the Legislature. At the dawn of civil society all power is vested in the majority. If this majority retains the legislative power in its own hands and keeps the Executive in subordination to it then 'the form of the Government is a perfect Democracy'. If they put the legislative power into the hands of a few select men and their heirs and successors, it is an oligarchy; if into the hands of one it is a monarchy, either hereditary or elective. The true criterion is found in the position of the Legislature.

'The form of government depending upon the placing the supreme power which is the legislative (it being impossible to conceive that an inferior power should prescribe to a superior, or any but the supreme make laws) according as the power of making laws is placed, such is the form of the Commonwealth.'<sup>1</sup>

From the English philosophers of the seventeenth century to the greatest of the political philosophers of France it is a long step. The *Esprit des Lois* (1748) is separated chronologically from the *Two Treatises of Government* (1689) by little more than half a century but philosophically and critically there is a great gulf between. The method of Locke, like that of Hobbes, is purely abstract; Montesquieu has some claim to be regarded as the father of the modern historical method. As regards the form of the State he does not depart widely from his predecessors. His categories are republics, monarchies, and tyrannies. A Republican government was one in which the people as a body or even a part of the people has the sovereign power; monarchical that in which a single person governs, but only by fixed and established laws; while in despotic government a single person, without any law or rule, administers everything according to his will and caprice.<sup>2</sup>

Burke is concerned rather with the art of Government

<sup>1</sup> *Second Treatise on Government*, c. x, § 132.

<sup>2</sup> *Esprit des Lois*, Bk. II, c. i.

than with the science of Politics ; and though much of his teaching fulfils Aristotle's ' law of the universal ' he makes no direct contribution to the theory of classification. To him the State is not a human but a divine institution, and he pours ridicule alike upon Locke's doctrine of the ' Social Contract ' and upon Rousseau's *Sovereignty of the People*. The English utilitarians gave little thought or at any rate little space to the question under review.

German  
philosophy

To the German philosophers, on the contrary, it makes, as would be expected, a more direct appeal. Schleiermacher,<sup>1</sup> F. Rohmer,<sup>2</sup> Robert von Mohl,<sup>3</sup> Georg Waitz,<sup>4</sup> and Bluntschli,<sup>5</sup> all devoted considerable space to this branch of Political Theory ; but it is to Treitschke<sup>6</sup> that we turn for the characteristic German treatment of the problem of government. Treitschke is a pure Aristotelian in method if not in conclusions, and he subjects the various forms of government to a peculiarly penetrating analysis.

Treitschke's  
Theory of  
the State

With the discussion as to the ideal form of government Treitschke will have nothing to do ; every constitution must be judged exclusively with reference to the circumstances of the State and people for which it is designed. He is thus in accord with the best traditions of Positivist philosophy : ' The historian must be content to ask " Which form of state and of law was best suited to a particular nation at a particular time " . ' For the modern State, Theocracy may be ruled out since it ' implies a bondage to a primitive moral code which could not be tolerated in any free and progressive nation '. Democracy fares little better at his hands : ' for the very word " Democracy " contains a contradiction in terms. The notion of ruling implies the existence of a class that is ruled ; but if all are to rule where is this class to be found ? A genuine democracy, logically carried out,

<sup>1</sup> *Ueber die Begriffe der verschiedenen Staatsformen.*

<sup>2</sup> *Lehre von den politischen Parteien.*

<sup>3</sup> *Staatswissenschaft.*

<sup>4</sup> *Grundzüge der Politik.*

<sup>5</sup> *Lehre vom modernen Staat* (Eng. trans., Clarendon Press, 1885).

<sup>6</sup> *Die Politik.*

aims at a goal which, like that of a Theocracy, is impossible. Both have in common the convulsive effort to attain an idea which by its nature is unattainable.' To Aristocracy, as exemplified by England in the eighteenth century, he cannot and does not refuse his meed of admiration. His 'own dear teacher Dahlmann' was an ardent advocate for constitutional monarchy, but it is significant that it was the English constitutional monarchy of the eighteenth century that Dahlmann also had in mind.<sup>1</sup> Constitutional monarchy is, however, to the Prussian school of publicists an English exotic. 'It would obviously be undesirable,' writes Treitschke, 'even if it were possible, that a monarchical system like the English, which is the product of peculiar historical circumstances, should be adopted in its entirety by other States.' As worked by the English aristocracy it was admirably suited to the English genius, and achieved great things for the people to whom it owed its birth. 'The English Parliament in its great days was a worthy counterpart of the Roman Senate. England was then an aristocratic republic in the grand style. . . . The necessity for an aristocratic party government was based on the whole history of the State. And this party government accomplished great things. It raised England to the position of the leading commercial power; but it could endure only so long as the aristocracy was really the first class in the land and was recognized as such. After the beginning of the nineteenth century this state of things began gradually to change.' For the English democracy—the *Parlamentarismus*—of the nineteenth century Treitschke has the contempt characteristic of the school to which he belonged. He admits that the democratic idea 'has a certain sublimity' and even that 'at a certain stage of national civilization a democracy may assist the progress of culture'; but it is for monarchy of the Prussian type, an autocracy served by a devoted and efficient civil service, that his real admiration is reserved. To him the essential forms of government are three:

<sup>1</sup> His treatise on Politics was published in 1835.

Theocracy, Monarchy, and Democracy : and although he declines to arrange them 'in order of moral rank', he unhesitatingly prefers, for his own country, the second.

Treitschke's treatise on *Politics* is in some respects the most comprehensive since the days of Aristotle ; nor is it in criticism the least acute ; but to the scientific problem of classification it makes, as we have seen, but a slender contribution.

Seeley Sir John Seeley's lectures on Political Science were posthumously published in the year of Treitschke's death (1896). The biographer of Stein had something in common with the Prussian school. Like Treitschke, Seeley drew much of his inspiration from Pertz's *Life of Stein*, but he approached the problems of statecraft from the point of view not of a Prussian *Regierungscommissar* but of an English constitutionalist. His Cambridge lectures, despite an inevitable tenuity of treatment, represent the first real attempt to review, in the light of modern history, the accepted canons of classification. The style, as befits oral teaching, is hortatory and discursive rather than literary ; none the less it must be conceded that Seeley was the first to perceive or at least to proclaim that the 'accepted classification suggested originally by the very partial and peculiar experience of the Greek philosophers' must be abandoned as inadequate and inapplicable to the conditions of the modern world. He held that a fresh classification was the primary duty which lay before the modern student of Political Science, and he accordingly devoted the main portion of a course of academic lectures at Cambridge to this problem.<sup>1</sup> He did not underrate the difficulty of his task, but he regarded its importance as proportioned to its complexity.

He proposed as his first and perhaps most comprehensive differentia the motive or binding force which holds States together. On this basis of classification States may be placed (in an ascending political scale) in three categories : first, tribal communities which, like primitive

<sup>1</sup> *Introduction to Political Science*, by Sir J. R. Seeley (1896).

Rome, are held together by the tie of kindred ; secondly, the Theocratic State which depends upon community of religion ; and thirdly, the Political State which is based upon community of interest. Manifestly, however, there is another tie which cannot be ignored, force.

'Sheer superiority of force on the part of the ruling class inspiring first terror and after a certain time inert passive resignation—this is the explanation of perhaps half the States in the world. But force is not *in pari materia* with kindred, religion or interest, and such States, due to violent incorporation, must be described as "inorganic", since they rest upon something quite unlike the natural organic union out of which the living State grows.'

The formula thus proposed can hardly be accepted as scientifically satisfactory. Valuable as an historical generalization it seems to be analytically inadequate. It neither covers nor explains the facts by which, in the modern world, we are confronted ; it does not really provide a scientific differentia. Before it can be accepted an initial difficulty must indeed be investigated. Can a tribal community or even a Theocracy be properly described as a State ? The Ireland of the tenth century, for example, was not strictly a State ; it was a congeries of tribal communities. The Jews under the Mosaic dispensation were a self-conscious *nation* ; not until they had asked for and obtained a king did they form a State.

We may pass, however, to the second *differentia* proposed by Seeley : the proportionate sphere occupied by central and local government respectively. Adopting this basis he divided States into (i) the city-state, and (ii) the country-state. In the former category would be included the typical States of ancient Greece ; medieval States, such as Venice, Florence, and Geneva, and Imperial cities, like Frankfurt and Bremen. In these, local government as distinct from central did not exist. The latter terms would embrace practically all the States of the modern world. These, however, demand further classification as follows : (a) Unitary States such as



France, which are highly centralized ; (b) States like the United Kingdom, in which, though technically unitary, local government occupies a very large and important sphere ; (c) Federal States where local government actually predominates, as in the United States of America ; and (d) Confederations, such as the German Bund of 1815 or the old Helvetic Confederacy, where the power of central government was reduced to a minimum.

We have here a differentiating principle of real value to the student of contemporary Politics, and it will demand further and more detailed examination in a later section of this chapter.

A third basis of classification is discovered in the kind and degree of 'liberty' enjoyed by a State. Liberty is, of course, an ambiguous term : it may refer primarily to national independence, the absence of external restraint ; or to the limitation of the province of government ; or to the participation of the governed in government. It is in the third sense that Seeley presses the word into service as a classifying *differentia*. From this point of view States are divided by him into (a) despotisms ; and (b) governments by Assembly. The latter are distinguished by the possession of a 'government-making organ'—the absence or presence of organized and recognized machinery by means of which the actual government or administrations can be changed within the limits of the law and the constitution and without recourse to revolution. Under the application of this list England only ceased to be a despotism after the Revolution of 1688 and the adoption of the principle of 'responsible government'.

Here again we seem to possess a differentiating principle of considerable value, though the terminology is unnecessarily cumbrous and involved.

Finally, Seeley classifies States according to the basis—broad or narrow—on which government rests. The former he describes as Democracies—States in which the many govern in the interests of all ; the latter as Aris-

tocracies, which show, in fact, a constant tendency towards Oligarchy, where the interests of the many are sacrificed to those of the few. It will be perceived that Seeley is here getting on to ground already traversed in connexion with the categories of Aristotle, and further discussion is, therefore, unnecessary.

The foregoing investigation into the history of Political Theory, though cursory and incomplete, would seem at least to have established one negative conclusion: that the classical categories are inadequate to the conditions prevailing in the modern world. To divide the great States of to-day into Monarchies, Aristocracies, and Democracies would obviously not carry us very far, even if we could anticipate universal assent to the resulting classification. To which of the three categories must we assign, for example, the Constitution of Great Britain and the United States respectively? If the term 'democracy' be claimed, as it must be, for republican America, can it be denied to England, still monarchical in form but in some essential respects more democratic than the United States? Again, it is obvious that there were far more points in common between the Constitutions of the German Empire and the American Republic than between those of republican America and republican France. The neighbouring republics of France and Switzerland had less in common, again, than Switzerland and Imperial Germany. Monarchical England was less akin to monarchical Russia than to republican France.

These four instances, which might be indefinitely multiplied, are sufficient to suggest the need for a new basis of classification. They do more; they indicate the direction in which it must be sought. Setting aside certain oriental despotisms of the type of Persia or Afghanistan and confining attention to a few of the greater States of the modern world, what is the conclusion which emerges? Let the following States be taken as typical: the United Kingdom, France, Spain, Italy,

New bases  
of classification

Belgium, Japan, Chile, the United States, Canada, Australia, Switzerland, Brazil, Mexico, and the Argentine Republic. On a bare enumeration it will be at once apparent that on one intelligible *differentia* these States fall into two distinct groups; the first seven, differing *inter se*, have this in common: they are all Unitary States; the last seven, similarly differing *inter se*, are all Composite or Federal States.

Unitary  
and  
Federal

The fact which thus emerges would seem to suggest the first and perhaps the most fundamental basis of classification: modern States may be divided into *Unitary* or *Federal*. To the former class we must assign, among others, France, Italy, Spain, Belgium, Denmark, Norway, Sweden, Greece, Roumania, Bulgaria, Serbia, Portugal, Japan, Chile, Peru, Bolivia; to the latter, Germany, Imperial or republican, the United States, Switzerland, Australia, Canada, Brazil, Mexico, Venezuela, and the Argentine Republic. It is more difficult to classify the Kingdom of the Netherlands, the constitution of which, though formerly federal, has tended more and more towards the unitary type; but of all the States thus enumerated the most ambiguous as regards constitutional position is Great Britain. Even in the Constitution of the United Kingdom there is, as will be shown hereafter, a large admixture of federalism. In that of the British Empire there would seem to be more. At first sight it is difficult to assign Great Britain, with its 'Imperial' Parliament, with the statutory and technically subordinate Legislatures in Canada, Australia, New Zealand, South Africa, and elsewhere, with its vast network of Crown Colonies and Dependencies, to the *unitary* group. Nor would it always have been accurate to do so. In the past England and even Great Britain would have been accurately classified as a Composite State. Between 1603 and 1707 England and Scotland, between 1714 and 1837 Great Britain and Hanover were united in a 'personal union'—comparable with, but less intimate than, the union which formerly existed between Austria and Hungary. Between

1782 and 1800 there were in Great Britain and Ireland two Parliaments—nominally co-ordinate—and united only by the connecting link of a common Monarchy. But since 1801 there has been no independent Legislature in the British Empire ; and this must be regarded as the ultimate and discriminating test. For the whole British Empire *Sovereignty* is vested in the 'Imperial' Parliament, i. e. in King, Lords, and Commons sitting at Westminster. The British Empire is, therefore, technically a 'unitary State'.

A second basis of classification may be found in the character of the Constitution itself. Constitutions may be distinguished as *Rigid* and *Flexible*. A *Rigid* Constitution is one which can be altered and amended only by the employment of some special, and extraordinary, and prescribed machinery, distinct from the machinery of ordinary legislation. A *Flexible* Constitution is one in which amendment takes place by the ordinary process of law-making—and indeed of administration, in which there is no formal distinction between 'constitutional' and ordinary laws, between (as Cromwell put it) 'fundamentals' and 'circumstantials'. In other words, Constitutions are differentiated by the position, authority, and functions of the Legislature. Under *rigid* Constitutions its function is merely *legislative*—to make laws under the limitations of the *Constitution* ; under *flexible* Constitutions its function is not only legislative but *constituent* ; not only to enact, to amend, and repeal laws, but to make and modify the Constitution. At the opposite poles, in this respect, stand the Constitutions of England and the United States, though the latter is less rigid in practice, if not in theory, than it formerly was.

The mention of England and America necessitates at this point a word of caution. A 'rigid' Constitution is no longer—if it ever was—identical with a *written* Constitution. As a matter of fact a written Constitution is usually 'rigid' in the sense that it provides special machinery for its own amendment. But the rule is not invariable, least so in Constitutions modelled on that of England.

Thus the Italian *Statuto* ' contains no provision for amendment, but can be, and in fact has been altered by the ordinary process of legislation; and the same thing was true of the French Charter of 1830. The last Spanish Constitution omits all provision for amendment, but one may assume that if it lasts long enough to require amendment the changes will be made by ordinary legislative process.' <sup>1</sup>

Nevertheless the distinction between 'written' and 'unwritten' Constitutions would in practice correspond so closely to that between 'Rigid' and 'Flexible' that it is not worth while to suggest it as a separate basis of classification.

Parliamentary  
and Presidential

A third *differentia* may be found in the position of the Executive and in particular the relation of the Executive to the Legislature. The Executive may be either superior to, co-ordinate with, or subordinate to the Legislature.

In an autocracy the Executive is supreme. Of such autocracies we have examples in the former Russian Empire and in many non-European despotisms such as Persia, Abyssinia, or Afghanistan. The former German Empire tended to the same type, for the *Bundesrat* which shared power to some extent with the Emperor was essentially an aggregate of the Executives of the Constituent States rather than a branch of the Imperial Legislature. In no sense was the Imperial Executive responsible to the Legislature. Switzerland stands at the opposite pole in this respect, the Federal Council being not merely subordinate to the Legislature, but actually its agent, if not indeed the agent of the electorate.<sup>2</sup> In the United States the Executive is co-ordinate in authority with the Legislature, and the United States has afforded a model for the federal republics of South America—Brazil, Mexico, Venezuela, and the Argentine. In France, on the other hand, the Legislature is supreme over the Executive, as it is, technically at least, in Great Britain, and in the constitutional monarchies, such as Italy, Spain, Belgium,

<sup>1</sup> Lowell, *The Government of England*, i. 3.

<sup>2</sup> See *infra*, c. iv.

and Greece,<sup>1</sup> which have adopted the English model. To the Executives of non-parliamentary States of the American type we may apply the term *Presidential*; 'responsible governments' based upon the English model may be distinguished as *Parliamentary*.

The typical States of the modern world would seem, therefore, to fall into three categories, according as their Constitutions are: (i) Unitary or Federal; (ii) Rigid or Flexible; (iii) Presidential or Parliamentary. It will, of course, be obvious that the suggested categories involve a 'cross' classification; the Constitutions, for example, of Australia and the United States have federalism and rigidity in common, but the former is parliamentary and the latter presidential. Similarly, France and England are alike unitary and parliamentary, but the Constitution of the former is, technically, rigid, that of the latter in the highest degree flexible. Nevertheless, the suggested categories, it is contended, do afford what the classical categories do not, intelligible *differentiae* on the basis of which the States of the modern world may be classified with some approach to scientific accuracy, and with some regard to the realities of constitutional procedure.

It will not, however, escape observation that to all these States, whether their Constitutions be federal or unitary, rigid or flexible, presidential or parliamentary, the title 'democratic' could hardly be denied. Yet the democracy of Switzerland is obviously of a different type, colour, and texture from that of Belgium; that of the United States from that of Great Britain; that of Australia from that of France. It would seem, therefore, to be desirable to examine, in some detail, the implications of the term; the next Book will consequently be concerned with varying types of 'democracy'.

<sup>1</sup> Written before the establishment of a Fascist dictatorship in Italy, and the declaration of a Republic in Greece.



BOOK II  
SOME TYPICAL DEMOCRACIES





### III. DIRECT DEMOCRACY

#### *The City-State of Greece*

'It is true that we are called a democracy, for the administration is in the hands of the many and not of the few. But while the law secures equal justice to all alike in their private disputes, the claim of excellence is also recognized; and when a citizen is in any way distinguished, he is preferred to the public service not as a matter of privilege, but as the reward of merit. . . . There is no exclusiveness in our public life and in our private intercourse we are not suspicious of one another, nor angry with our neighbour if he does what he likes. . . . While we are thus unconstrained in our private intercourse, a spirit of reverence pervades our public acts; we are prevented from doing wrong by respect for the authorities and for the laws . . . as well as for those unwritten laws which bring upon the transgressors of them the reprobation of the general sentiment.'—PERICLES, *Funeral Oration ap. Thucydides*, ii. 37.

'Athènes n'était point en effet une démocratie, mais une aristocratie très tyrannique, gouvernée par des savants et des orateurs.'—ROUSSEAU, *Économie publique*.

'Democracy is the progress of all through all under the leading of the best and wisest.'—MAZZINI, *Duties of Man*.

'What is curious is that the same persons who tell you that democracy is a form of government under which the supreme power is vested in all the members of a state will also tell you that the Athenian Commonwealth was a democracy.'—BENTHAM, *Fragment on Government*.

FEW words in the terminology of Political Science have given rise to greater confusion of thought than 'democracy' and 'democratic'. Democracy, as defined by the *Oxford Dictionary*, means 'government by the people, direct or representative: the politically unprivileged class'. The second usage, though common, is inaccurate, and throughout this work the term will be used to signify a form of government under which supreme power is vested in the many.

Democracy: direct and indirect

Within this general definition it is, however, possible and important to distinguish certain widely differing types. Of these the most broadly distinguishable are direct and representative democracy. In the former

supreme power is continuously vested in the whole body of citizens ; in the latter the actual exercise of authority is delegated to elected representatives. But even of indirect democracy there is, as will be shown, more than one variety.

In order to bring into relief the salient characteristics of various types of government to which in common (and not without justification) the term 'democracy' is applied, it is proposed to examine, in broad outline, the outstanding features of the democratic State, as exemplified respectively by the constitutions of Athens, of the Swiss Confederation, of the United States, and of the British Commonwealth of Nations.

The Greek  
City-State

It is to the brilliant achievements of Hellas and in particular to the great part played in history by the Athenian Commonwealth that the apologists for democracy are wont most frequently to appeal. A closer scrutiny of certain features of Athenian democracy would seem, as Bentham suggests, to render the appeal somewhat incautious if not incongruous. Athens, at the zenith of her fame and prosperity, was dominated by the genius and character of Pericles. 'Though still in name a democracy Athens', says Thucydides, 'was in fact ruled by her leading citizen.'<sup>1</sup> Yet, as Pericles himself in the classical passage prefixed to this chapter reminded his countrymen, their government was described as a democracy, and no attempt to pierce, beyond words, to the heart of things can afford to neglect the Athenian example.

Simplifi-  
cation of  
political  
pheno-  
mena

There are, moreover, several specific reasons why a study of the structure of the modern State should begin with an analysis of the Athenian Constitution. The first, as indicated in the preceding chapter, is the relative simplicity of the phenomena and the consequent simplification of the problems which called for solution. Many of the problems by which the citizen-ruler of the modern State is perplexed confronted also the Athenians ; but the environment was far less complicated. Take

<sup>1</sup> ii. 65.

education. Many of the principles which govern or ought to govern the educational systems of modern democracies were first enunciated by Plato and Aristotle. But for them educational problems were not complicated, as for better or worse they are in the modern State, by questions of creed and ecclesiastical traditions. Consequently the atmosphere of the discussion was sterilized ; the Greeks could analyse the phenomena in a dry light.

It was not only, however, in the sphere of education that Politics were simplified in the Greek State by the absence of a ' Church '. To say that the Greeks had no ' Church ' is not, of course, to suggest that they had no religion. But although their hierarchy of Deities was an ample one and though they indulged in elaborate ritual they were not, like the Hebrews, essentially a religious people ; they had little interest in theological speculation, and, above all, they had no ecclesiastical organization distinct from and in potential antagonism to the State. To the Greek the State was the Church ; the Church was the State. Consequently there could for him be no problem of ' Church and State ' such as that which perplexed and distracted the citizen of the medieval State, and is, even yet, far from complete solution. ' Hellas the nurse of man complete as man, Judaea pregnant with the living God.'

In order to estimate the measure of simplification thus achieved for the Greek State we have only to eliminate from our own history the pages which recite the contest between the claims of the Church and those of the secular ruler—personal or democratic. From the days of William the Norman and Pope Hildebrand down to the enactment which legalized marriage with a deceased wife's sister, the conflict has been almost unceasing, and has supplied material for acute and embittered controversies. Of this conflict of loyalties, of the claims, sometimes irreconcilable, of the Church and the State, the Greek knew nothing, and by the absence of this factor alone political problems were immeasurably simplified.

Slavery Not less important, in the same connexion, was the institution of slavery. It is a truism to say that in the modern State Politics have, to a great extent, been merged in Economics. Even among the free citizens of Athens there were, it is true, violent contrasts of wealth and poverty. Those contrasts were a source of perpetual anxiety both to statesmen like Solon, and to philosophers like Aristotle. But the conflicts which arise from the economic organization of the modern State were almost entirely eliminated from the Greek State owing to the fact that the economic substratum of society was supplied by slaves. In Aristotle's day the morality and even the political expediency of slavery as an institution was seriously impugned. Aristotle did not indeed shrink from a defence of it. He defended it not only as an institution essential to the life of leisure for the free citizen, and fundamentally essential, therefore, to the experiment of direct democracy, but also as an institution natural in itself, and mutually advantageous alike to master and man.

To the modern mind familiar only with the history of negro slavery Aristotle's argument is apt to appear fantastic and paradoxical. The treatment of Athenian slaves was, however, almost invariably gentle and humane, and socially they differed little from the poorer classes of free citizens. Moreover, the institution was commended to Aristotle by the 'harmony of nature'. Not a few men are 'naturally slaves'; the principle of rule and subordination pervades all Nature. The lower animals are subordinated to man; in man the body is subordinated to the soul; within the soul appetite is subordinated to intellect. For the 'natural slave'—and there are many such—a life of subjection to a noble master is as truly advantageous as the subordination of the body to the soul. This doctrine of 'natural slavery' and its mutual advantage does indeed presuppose, as Francis Newman pointed out, 'not only a low intellectual level in the slave, but high moral and intellectual excel-

lence in the master.' <sup>1</sup> The weaker nature might thus gain by association with the stronger. But this argument cannot be pursued ; it suffices for the immediate purpose to indicate the immense simplification of political phenomena due to the institution of slavery, and, even more, its fundamental importance in the actual working of Athenian democracy. A modern scholar does not go too far in saying that without the slave class Athenian democracy, at least in its final form,

' would not have been possible. The four hundred thousand Athenian slaves of the fifth and fourth century were the " necessary condition " of Athenian development. They were the " living instruments " of the household and the farm, they worked for the wealthy contractor in the mines, they manned the merchant fleet, and they sometimes formed a class of country tenants who paid, like the helots, a fixed proportion of the produce to the leisured masters in the city.' <sup>2</sup>

In these, and in other ways, Greek politics were, as compared with politics in the States of the modern world, greatly simplified. Relative simplicity of phenomena was, however, combined with a rich variety of constitutional types. Each of the little Greek States had its own distinctive *êthos* ; each was founded upon a dominant principle ; each was inspired by a spirit peculiar to itself. Progress in political and social science depends largely upon the avoidance of dull and drab uniformity and the preservation of a variety of political types. Two great teachers have recently borne concurrent testimony to this truth :

Simplicity  
and  
Variety

' The mere fact ', writes Mr. H. A. L. Fisher, ' of this variety is an enrichment of human experience and a stimulus to self-criticism and improvement. Indeed, the existence of small States operates in the large and imperfect economy of the European system very much in the same way as the principle of individual liberty operates in any given State, preventing the formation of those massive and deadening weights of conventional opinion which impair the free play of

<sup>1</sup> *The Politics of Aristotle*, i, p. 144.

<sup>2</sup> Greenidge, *Handbook of Greek Constitutional History*, p. 132.

individuality, and affording a corrective to the vulgar idea that the brute force of organized numbers is the only thing which really matters in the world.' <sup>1</sup>

Similarly, Professor Ramsay Muir writes :

' one of the reasons for the gradual decay of civilization in the period of the Roman Empire was just that the Romans had succeeded (in spite of their tolerance) in impressing too high a degree of uniformity upon the world. . . . The greatest security for the progress and vitality of civilization is that there should be the greatest possible variety among civilized States.' <sup>2</sup>

The Greeks secured this indispensable condition by the continued independence of a number of small States and by the multiplication of many types of constitution.

Thus, in more than one way, Greek democracy was *sui generis*, but before passing to an analysis of the actual Greek Polity, it may be well to examine, very briefly, the theory of Greek democracy as expounded by its most brilliant apologist. In this way we may, perhaps, best avoid the confusion likely to arise from simultaneous excursions into history and philosophy, without sacrificing the illumination derived from either.

Aristotle's  
analysis of  
the theory  
of demo-  
cracy

Aristotle, whose general outlook upon politics was, as we have already hinted, conservative, has vindicated in a notable passage the political capacity of the many : ' Any member of the Assembly taken separately is certainly inferior to the wise man. But the State is made up of many individuals. And as a feast to which all the guests contribute is better than a banquet furnished by a single man, so a multitude is a better judge of many things than any individual.' <sup>3</sup> Plato, on the contrary, held that the science of ruling was more likely to be found in the one or the few than the many, and it is noteworthy that the species of democracy favoured by Aristotle was of the moderate type to which he gave the

<sup>1</sup> *The Value of Small States*, p. 15.

<sup>2</sup> *The National Principle and the War*, p. 5.

<sup>3</sup> *Politics*; iii. 15.

name 'Polity' or Constitutional Government *par excellence* (πολιτεία) and which he carefully distinguished from the more extreme type, instituted by the Athenians in the fourth century and described in the second part of Aristotle's Constitution of Athens.

To Aristotle the basis of a democratic State is liberty and equality; it is founded on the assumption that 'those who are equal in any respect are equal in all respects: because men are equally free, they claim to be absolutely equal'.<sup>1</sup> Liberty, he held, is unquestionably the supreme end of democracy. How does democracy propose to attain it? The primary condition is that all should rule and be ruled in turn; the magistrates should be selected 'by all out of all, not by vote but by lot; there should be no property qualification or only a very low one'; the tenure of office should be brief; and no one should hold the same office twice in succession, 'or not often' except in the case of military officers. The judges should be popularly elected, but over the Judiciary, as over the Executive, the Assembly should be supreme. Another characteristic of democracy is payment for service: 'assembly, law courts, magistrates, everybody receives pay when it is to be had'; but herein lurks a danger, especially in the later stages of democracy, when the 'cities have far outgrown their original size and their revenues have increased'. In such circumstances power is apt to fall into the hands of the poorest classes, for 'when they are paid the common people have the most leisure, for they are not hindered by the care of their own property, which often fetters the rich who are thereby prevented from taking part in the Assembly or in the courts, and so the State is governed by the poor who are a majority and not by the laws'. To the supremacy of the law Aristotle attaches the highest importance. One type of democracy is indeed distinguished from another by the degree of respect for law. In extreme democracies there is apt to prevail a false idea of freedom:

Character-  
istics of  
demo-  
cracy

Its  
dangers

Liability  
to anarchy

<sup>1</sup> V. 1. 3.



that 'freedom and equality consist in doing as one likes'. This, says, Aristotle is wrong: 'men should not think it slavery to live according to the rule of the Constitution; for it is their salvation.' Demagogues, however, 'made the decrees of the mob override the laws,' and thus the mob, no longer under the control of law, develops all the vices of a tyrant. 'Such a democracy', he concludes, 'is fairly open to the objection that it is not a Constitution at all; for when the laws have no authority, there is no Constitution.'<sup>1</sup>

Instability Nor is such a democracy likely to endure. It is, indeed, less difficult to establish a democracy than to preserve it, for democracy is peculiarly obnoxious to certain corroding influences of a subtle kind, and the real test of the soundness of a democratic constitution is its capacity for self-preservation. One conspicuous danger lies in the temptation, to which demagogues are prone, to seek popularity with the mob by imposing a property tax and 'confiscation by process of law', and these things, he adds, 'have before now overthrown many democracies.' Extremes of wealth and poverty should, as far as possible, be avoided, and the wise statesman will adopt measures for improving the permanent prosperity of the poorer classes but not, be it noted, by doles. 'Where there are surplus revenues the demagogues should not be allowed after their manner to distribute them; the poor are always receiving and always wanting more and more, for such help is like water poured into a leaky cask.' In these general reflections upon democracy Aristotle had, of course, in view some of the worse features of Athenian government in the day of decline and degeneracy; but the warnings are apt for all time. The oppressive and vindictive taxation of the rich; the prevalence of doles and largesses; the increasing demand for payment for civic services—'in all these financial arrangements', as a modern critic has pertinently observed, 'there appears one of the worst tendencies of democracy, the tendency of the people to

<sup>1</sup> iv. 4, 30.

shift burdens to the shoulders of the rich and to find for itself a source of gain in the use of political power.'<sup>1</sup>

From the theory of Aristotle we may pass to the concrete characteristics of Greek democracy, and in particular of Athens.

The Greek State, it is imperative to insist, consisted invariably of a single walled city with a sufficient amount of circumjacent territory to render it economically self-sufficing. Attica contained about the same superficial area as Oxfordshire. Nor was this form of organization fortuitous. It had its origin no doubt in the physical configuration of Hellas; in the difficulties presented to inland communication by the mountains, in the facilities offered by the sea. The result was, as Henry Sidgwick points out, that the Greeks combined the spirit of independence as regards outsiders, and mutual dependence within the community, characteristic of mountaineers 'with the awakened intellect and varied experience of a seafaring people'.<sup>2</sup> Strategical considerations reinforced the dictates of physical configuration. To be reasonably secure against the attacks of numerous neighbours, similarly organized and equally tenacious of their independence, it was essential that the small community should have the protection afforded by walls.

Characteristic features of the Greek City-State

'As to walls,' says Aristotle, 'those who say that cities making any pretension to military virtue should not have them are quite out of date in their notions; and they may see the cities which prided themselves on this fancy confuted by facts. . . . To have no walls would be as foolish as to choose a site for a town in an exposed country, and to level the heights; or as if an individual were to leave his house un-walled lest the inmates should become cowards.'<sup>3</sup>

The walled town afforded security not only to the inhabitants of the actual city, but to the husbandmen in the circumjacent country which furnished the city with food and guaranteed its economic independence.

<sup>1</sup> Ernest Barker, *Political Thought of Plato and Aristotle*, p. 458.

<sup>2</sup> *European Polity*, p. 69.

<sup>3</sup> *Politics*, vii. 11.

Limita-  
tion of size

Such considerations necessarily implied a severe limitation of size. Nor were the reasons for this limitation exclusively economic and military. Common citizenship implied not merely mutual security and economic independence but continuous intellectual intercourse; and this could be obtained only in the city provided with its portico and market place, its theatre, temples, and gymnasia. Most important of all: political life, in the Greek sense, would be impossible, unless the citizen-rulers were well acquainted with each other.

'If the citizens', says Aristotle, 'are to determine questions of justice and distribute offices of State according to merit it is essential that they should know each other's characters; where this is not the case things must needs go wrong with the appointment of officials and the administration of the law; but it is not right to settle either of these matters at haphazard, and that is plainly what happens when the population is over large.'<sup>1</sup>

On the other hand the population must be large enough to render the State self-sufficing, though the manual labour will be done by slaves who not being members of the State are not reckoned in the population. What, then, should be the population of our ideal State? 'Ten men', says Aristotle, 'are too few for a State; one hundred thousand are too many.' An overgrown city 'is a nation not a state, being almost incapable of constitutional government'. Aristotle himself favoured a state with forty to fifty thousand inhabitants.

According to the computation of Ctesicles, formerly accepted as conclusive, the population of Athens numbered about 500,000, of whom no less than 400,000 were slaves. Others put the free population, at the beginning of the Peloponnesian War, at from 120,000 to 140,000, in addition to 10,000 Athenian citizens dwelling in the Cleruchies. Of these, some 40,000 to 47,000 were burghesses—adult citizens in full possession of political rights.<sup>2</sup>

<sup>1</sup> *Politics*, vii. 4.

<sup>2</sup> Bryce, *Modern Democracies*, puts the adult male citizens at 30,000 to 35,000.

The non-citizen class was computed at 110,000, of whom 10,000 were *Metoiikoi*, or duly registered resident aliens, and 100,000 were slaves. The slaves, therefore, outnumbered the burgesses by rather more than two to one.

Whatever the precise numbers, it is certain that the citizen population was relatively small and Aristotle in no wise exaggerates the significance attaching to a rigid limitation of their numbers. Only such a limitation rendered feasible the realization in practice of the Greek theory of democracy. Citizenship implied direct and personal participation in public affairs. The citizen of the modern State habituated to exclusion from the duties of government, first by the prevalence throughout the Middle Ages of the feudal system, and later by the emergence of more or less benevolent autocracies, is apt to regard 'public life' as something to be entered upon or avoided according to the whim of the individual. He may even, without loss of self-respect or the regard of his neighbours, refuse to exercise the electoral franchise incidental to representative democracy.<sup>1</sup> Signs are not indeed lacking that this attitude of indifference to public affairs will not be much longer tolerated, or if tolerated will be persisted in only at the peril of economic extinction. But the Greek idea that citizenship implies personal participation in the responsibilities of government wins its way slowly among the peoples of the modern world. Yet to the Greek it was the core of his political creed. The full citizen was one who in turn ruled and was ruled : who played his part in the supreme legislative assembly ; who was in turn a member of the smaller executive boards ; who was in turn soldier, judge, and priest. To the value of the political education thus acquired by the citizen no one has borne more eloquent testimony than the late Minister of Education in England.

Direct  
Democracy

'Almost everything', writes Mr. Fisher, 'which is most precious in our civilization has come from small states . . .

<sup>1</sup> Contrast with this the reputed law of Solon, which threatened with loss of citizenship the citizen who refused to take sides in a 'stasis'.

the contracted span of these communities carried with it three conspicuous benefits. The city state served as a school of patriotic virtue. . . . It further enabled the experiment of a free direct democratic government to be made, with incalculable consequences for the political thinking of the world. Finally it threw into a forced and fruitful communion minds of the most different temper, giving to them an elasticity and manysidedness which might otherwise have been wanting or less conspicuous, and stimulating through the close mutual co-operation which it engendered, an intensity of intellectual and artistic passion which has been the wonder of all succeeding generations.' <sup>1</sup>

Athenian  
Democracy a  
product of  
evolution

We may now proceed to a description of the political institutions of the greatest of all city-states—whether in the antique or the medieval world. Not, however, without one word of caution. Athenian democracy, no less than our own, was the result of a process of evolution, extending throughout at least two centuries, the main stages being marked by the legislation of Solon (*circ.* 594 B.C.) and of Cleisthenes (508 B.C.), and by the administration of Pericles (460–429 B.C.). This truth, long since recognized by students of Greek politics, has been further emphasized by the discovery of Aristotle's *Athenian Constitution*.<sup>2</sup>

The Athenian  
Constitution  
of Aristotle

Aristotle there traces the evolution of the Constitution from its 'earliest beginnings under a monarchy to the final establishment of a complete and unfettered democracy'.<sup>3</sup> He indicates, indeed, no fewer than eleven clearly marked revolutions by which the democratic goal was ultimately attained. The foundations were laid by the original settlement of Attica under Ion, the division of the people into the four tribes and the creation of tribal kings. That Aristotle should lay stress upon this elementary stage is characteristic and significant in

<sup>1</sup> H. A. L. Fisher, *The Value of Small States*, pp. 9–11.

<sup>2</sup> The *Ἀθηναίων πολιτεία* was first published under the editorship of Sir F. G. Kenyon in 1891; Sir Frederic's last edition of his translation is contained in vol. x of *The Works of Aristotle translated into English*, Oxford, Clarendon Press, 1920.

<sup>3</sup> *Op. cit.*, introd., p. xxxiv.

view of the interweaving of the tribal organization (*φυλαί*) in the later texture of the Athenian Constitution. The first change is marked by a 'slight deviation from absolute monarchy' under Theseus. Next came the Draconian Constitution 'when the first code of laws was drawn up'. The civil war in the time of Solon marked a fourth stage as 'from this the democracy took its rise'. The fourth was the tyranny of Pisistratus; the fifth the Constitution of Cleisthenes 'of a more democratic character than that of Solon'. The sixth followed on the Persian Wars 'when the Council of Areopagus had the direction of the State'. The seventh was the Constitution 'which Aristides sketched out, and which Ephialtes brought to completion by overthrowing the Areopagite Council'. The eighth was 'the establishment of the Four Hundred', followed by the ninth, a restoration of democracy. The tenth was marked by an oligarchical reaction, described by Aristotle as 'the tyranny of the Thirty and the Ten'. The Democratic Constitution was, however, restored in 403 B. C. on the downfall of the oligarchy, and the eleventh and final stage 'has continued from that day to this, with continual accretions of power to the masses'. 'The democracy', so Aristotle concludes his rapid sketch, 'has made itself master of everything and administers everything through its votes in the Assembly and by the law courts, in which it holds the supreme power. Even the jurisdiction of the Council has passed into the hands of the people at large.'<sup>1</sup>

With the detailed process of evolution this work cannot concern itself; nor is it feasible to give a description of Athenian government which shall be accurate in respect of all the periods of Athenian history. All that can be attempted is a sketch in general terms of the salient features of Athenian democracy, with the special and indeed the exclusive object of pointing the contrast between the antique and direct form of democracy of which Athens afforded the most perfect example, and the

<sup>1</sup> *The Athenian Constitution*, § 41.

forms, which as subsequent chapters will show, are typical of the modern world.

The  
*Ecclesia*

Sovereignty was vested in the whole body of citizens and was personally exercised by them in the Supreme Assembly (*Ecclesia*) which generally met upon the Pnyx. There were forty ordinary meetings of the *Ecclesia* in the year; and, in addition, extraordinary meetings were held whenever special circumstances required. Every citizen of full age (20) was entitled to attend the *Ecclesia* and for each attendance to receive a fee which gradually rose from one obol to one drachma. For certain purposes a quorum of 6,000 was required. Proceedings, which took place in the open air, were opened by a sacrifice of purification, after which a president was appointed by lot, in the fifth century from the Prytaneis and in the fourth from the Proedroi.

Legisla-  
tive Pro-  
cedure

No business could in strictness be initiated except by a preliminary decree presented by the Council of Five Hundred (*Boulê*), which had its own chamber (*βουλευτήριον*). Such decree might either embody a definite proposal, in modern phraseology take the form of a Bill, or might contain only a general resolution, upon the basis of which the *Ecclesia* could legislate. The author of the decree in the Council ordinarily moved it in the *Ecclesia*, but it was open to any member of the *Ecclesia* either to propose amendments or to move an alternative resolution on the same subject. It was also competent to a member to move that the Council be directed to prepare and bring forward a decree on any subject. The *Ecclesia*, before coming to a decision, might call for expert advice, or for the opinion of one of the executive departments within whose province the matter lay. Voting took place ordinarily by show of hands; but if the division was close a count could be demanded. In certain delicate matters, as, for example, the ostracism of a citizen, voting was by ballot and took place in the agora.<sup>1</sup> As members

<sup>1</sup> As a fact there was no historical instance of the application of ostracism after that of Hyperbolus (417 B.C.).

owed no responsibility to any constituents but themselves, no exception could be taken to this procedure.

At this point we must note a feature of the Athenian Constitution which though presenting to the modern jurist a seeming anomaly is nevertheless highly characteristic of Athenian democracy. 'Sovereign' though the people was, and 'direct' as was the form of democracy, the competence of the *Ecclesia*—an assembly of the whole people—was nevertheless circumscribed by the Constitution. In this sense, therefore, 'sovereignty' must be ascribed not to the citizens but to the Constitution, i.e. the organic or fundamental laws of the city (*Νόμοι*). The distinction between *Νόμοι* and Decrees (*Ψηφίσματα*) was absolutely fundamental. The former were constitutional laws designed for permanent operation; the latter were rules made with reference to a particular occasion or to serve a special purpose, and did not possess the sanctity which always attached to the former. The distinction thus drawn is much more intelligible, for reasons which subsequent chapters will reveal, to an American, a Swiss, or even to a French than to an English jurist. The rigid Constitutions of Switzerland and the United States are based upon the fundamental laws of their respective Constitutions and can be altered only by a special and elaborate process; even France, with a Constitution only by a few degrees less flexible than that of England, distinguishes between 'organic' and ordinary laws. To the Athenians, with their respect for the Constitution, the distinction between the two forms of legislative enactment was vital. A further safeguard for the Constitution was furnished by the device known as the *γραφὴ παρανόμων* or indictment for illegality. This process applied equally to the proposer of a decree and the initiator of a law.

Laws  
(*Νόμοι*)  
and De-  
crees  
(*Ψηφίσ-  
ματα*)

The legality of any proposal could be challenged by any citizen; the matter was thereupon decided in the law courts, and if the decision was adverse the proposer was punishable by fine, or even, in extreme cases, by death. Three such condemnations involved the loss of the right



to propose motions in the *Ecclesia*—a salutary check upon frivolous proposals. If the proposals were carried or unchallenged the task of final revision, their incorporation in statutes, was committed to a legislative commission known as the *Nomothetae*.

Such were the constitutional limitations imposed upon themselves by the wisdom of the sovereign people of Athens in the heyday of their greatness and prosperity. In later and degenerate days the *Ecclesia* betrayed a disposition to make its decrees override constitutional law. This tendency, as we have seen, was noted by Aristotle as one of the indications of the lapse of democracy towards anarchy, and as a powerful contribution to that element of instability which seemed to him to be inherent in this particular form of government. Under the malign influence of demagogues 'the people which is now a monarch and no longer under the control of law seeks to exercise monarchical sway and grows into a despot'.<sup>1</sup>

Finance  
and  
Justice

Legislation was not, however, the sole function of the *Ecclesia*. The control and administration of the finances were vested, as will be seen presently, in the *Boulé*; but in every Prytany the *Ecclesia* received a report on the condition of the finances and a provisional audit of expenditure. In the administration of justice the competence of the *Ecclesia* was limited to two cases: the *Probolé* and the *Eisangelia*. The former was a criminal information laid before the *Ecclesia* in regard to the conduct of a citizen who had caused a disturbance at the festivals or had failed to keep his promises to the people. No penalty could be imposed by the *Ecclesia*, but if the vote of the Assembly was adverse to the defendant the pursuer could, without prejudice, enter a regular lawsuit against him. The *Eisangelia* was rather in the nature of a political impeachment against those who were accused of treachery to the State either in peace or war, or of disaffection towards the Constitution.

<sup>1</sup> *Politics*, iv. 4, 27.

The *Ecclesia* also exercised functions which in the modern State are more often, though not invariably, assigned to the Executive ; it decided questions of peace and war, selected the generals, fixed the pay of the soldiers, and controlled the conduct of military operations ; it decided the fate of conquered towns and territories ; appointed and instructed ambassadors, and received the envoys of foreign States ; it adjudicated upon the claims of those who desired admission to citizenship ; it regulated the religious festivals and decreed the initiation of new priesthoods and even the acceptance of new deities ; its approval was required for the construction of temples, public buildings, roads, walls, and ships, though the execution of these matters was committed to those who in modern phrase would be described as departmental officials. In fine, the *Ecclesia*—the whole body of citizens—was over all matters, temporal as well as spiritual, sovereign.

The actual work of government was largely in the hands of the *Boulé* or Council of Five Hundred. The primary duties of the *Boulé* were to prepare the business for the consideration of the Assembly and to give effect to its decrees.

The *Boulé* consisted of five hundred (afterwards 600) councillors, fifty being selected by lot from each of the ten (afterwards twelve) tribes into which the Athenian Commonwealth was divided. All Athenian citizens of not less than thirty years of age were eligible for membership ; they held office for one year, and were eligible for reappointment but only for one further term. After nomination but before entering upon office the councillor-elect was subjected, at the hands of the outgoing council, to a *Dokimasia*, or scrutiny into his private character and public conduct. From the verdict then given, an appeal was, in the later days of the Republic, allowed to the law-courts. Councillors received a fee of one drachma a day during their year of office, occupied seats of honour in the Theatre, and were quit of military service. The Council as a whole exercised certain disciplinary powers—

such as the power of expulsion—over its individual members, but the members were severally responsible for their official acts.

In the discharge of its official duties the Council was assisted by an organized secretariat, and for administrative purposes was split up into ten standing committees. One of the ten tribal groups formed this committee in turn for the period of a Prytaneia—the one-tenth of a year into which the Athenian year was divided.<sup>1</sup> Each tribal group acted, for its turn, as the executive committee of the Council, and its powers were virtually coextensive with those of the *demos* itself. It also gave effect to the decrees of the *Ecclesia* and superintended their execution. The Council had limited judicial functions, acting as a sort of court of first instance in cases of impeachment (*Eisangelia*); but its principal function was the control of finance.

The Financial System

There was no regular budget in Athens, but certain revenues were assigned to certain services, under the sanction and superintendence of the Council. The ordinary revenue was derived from custom duties on imports and exports, harbour dues, tolls on markets, &c., fees paid by the *metoikoi*, mining leases, and royalties, rents of State lands, houses, and buildings (probably insignificant in amount), court fees and fines, and, during the first Athenian League, the tribute of the allies. The total revenue derived from these sources is computed, in the early part of the fifth century, to have been nearly 2,000 talents, or approximately £460,000, while the average expenditure of Lycurgus during his twelve years' tenure of power (338–326 B. C.) was reckoned at 1,575 talents or £362,250 per annum.

<sup>1</sup> The ordinary Attic year was of 354 days divided into *twelve* lunar months of 30 and 29 days alternately. The deficiency was made up by inserting intercalary months from time to time as required. The year was also divided into *ten* periods of (ordinarily) 36 and 35 days each; or of 39 and 38 days in the intercalary years. Each one-tenth corresponding to the duration in office of a tribe (the *φυλή πρυτανεύουσα* or presiding tribe) was known as a Prytaneia; the Committees being known as Prytaneis.

In addition to the ordinary revenues of the State special contributions (*Leiturgia*) were made by the wealthier citizens to the musical and dramatic expenses connected with the religious festivals, and to the expenses of athletic competitions and state banquets. Finally, there was from time to time an extraordinary income-tax (*Eisphora*) levied for war purposes; there were voluntary contributions for the same purpose, while the maintenance of the navy (though not the building and equipment of the ships) was largely met by the system of Trierarchies, under which a particular ship was assigned for a period of six months to a particular citizen. The keeping up of an efficient fleet was one of the most important responsibilities imposed upon the Council. Military training was universal, and military service compulsory.

Athens cannot be said to have developed a bureaucracy; for a bureaucracy implies permanence of tenure, and the tenure of Athenian officials was, except in the case of military officers, limited to twelve months. The principle of rotation of office forbade the development of a bureaucracy of the modern type. Every citizen was indeed by turns civil servant, as he was by turns soldier, executive minister, and even priest. Nevertheless, there was a very complete and highly organized official hierarchy, and administrative duties were elaborately articulated. The magistrates were appointed either by election or by lot, in such a manner as to give each of the tribes an approximately equal share of representation. Like the councillors all officials had to pass a *dokimasia* and to take an oath before they assumed office. Each office was vested in a Board or Commission of ten members (corresponding roughly to the ten tribes), and in every Prytany all magistrates had to make a report, with special regard to expenditure, to the Council. The Council appointed by lot a Board of ten *logistae* whose business it was to audit the accounts in each Prytany, and with special elaboration at the close of the official year. No magistrate could, on the conclusion of his year of office, leave the

Magis-  
trates and  
Officials

country until the audit was completed and the accounts passed.

The  
Strategoi

Highest in the official hierarchy were the strategoi, ten in number, who formed the military Board. Military service was at once the privilege and duty of all citizens; it was also their security against foreign enemies and against the servile substratum of the State. The strategoi possessed the extraordinary privilege of summoning the *Ecclesia* and of submitting motions to the Council. They were responsible for national defence and for the conduct not merely of military operations but of foreign affairs and inter-state diplomacy. With the Council they raised all the funds for military purposes, took part in the assessment of the special income-tax, and assigned to individuals their share of the extraordinary burdens due to the exigencies of national defence or war. They had the care of the corn supply of the city and the custody of the State seal, and they performed at certain sacrifices the religious functions appropriate to their special position in the State. They were assisted in their duties by various grades of subordinate officers: Taxiarchs, Hipparchs, and others.

The strategia was, therefore, as a modern critic has said, 'undoubtedly the highest office of the State, the most natural object of ambition, and the surest basis of power . . . by the extent of the duties it involved, by its special powers of initiation, and its continuity, it offered opportunities of influence far above those presented by any other magistracy in the State'.<sup>1</sup> It was also the least democratic of all the magistracies. Re-election, forbidden in other offices, was in the strategia frequent.<sup>2</sup> A very high standard of efficiency was consequently maintained.

Finance  
Ministers

There was no single Treasury or Exchequer, financial administration being vested in a number of Boards, too

<sup>1</sup> Greenidge, *op. cit.*, p. 182.

<sup>2</sup> Pericles, for example, was re-elected fifteen times. The authority of a particular *στρατηγός* might be further enhanced by his appointment as *ηγούμενος* or *ἀντοκράτωρ*. Cf. Thucydides, II. lxx. 4, and Xenophon, *Hellenica*, I. iv. 20.

numerous to specify in detail and each charged with certain financial duties.

The Archons, nine in number,<sup>1</sup> formed the link between the administrative and judicial sides of the Athenian Constitution. Appointed by lot they performed their duties partly as individuals, partly as a College or Board. Thus the six junior Archons were collectively known by the ancient title of Thesmothetae or Lawgivers. The first Archon was the eponymous official of the State; he conducted the great Dionysia and other religious festivals; he had jurisdiction in all suits involving questions of family rights, had the guardianship of widows, orphans, and heiresses, protected parents against children, and generally supervised all family matters in the Commonwealth. The second Archon or Basileus had jurisdiction in all matters of religion and public worship, in cases involving blood guiltiness, and was specially charged with the care of the holy places and the superintendence of religious rites and ceremonies, and in particular of the mysteries. The third Archon or Polemarch was originally Minister of War, but his functions passed to the strategoi, and he was mainly concerned with suits in which foreigners, freedmen, or *metoikoi* were involved. The remaining six Archons were collectively charged with the revision of the statutes and with the supervision of certain specially important judicial business.

The  
Archons

On the conclusion of their term of office the ex-Archons became permanent members of the Court of the Areopagus. This Court is commonly held to have supplied the oligarchical element in the Athenian constitution, and the prestige it acquired during the Persian war is said by Aristotle to have 'tightened the reins of government' and to have delayed the advent of the extreme form of democracy.

The Court  
of the  
Areopa-  
gus

The competence of the Court in the administration of

<sup>1</sup> It was formerly believed that the nine archons superseded a single magistrate in 682 B. C.; but the Constitution of Athens has made it clear that there was a pre-existing board of three.

justice was considerably curtailed in the later stages of Athenian democracy, particularly, perhaps, after the victory of Salamis which, having been 'gained by the common people who served in the fleet, strengthened the more democratic elements in the Constitution.'<sup>1</sup> Yet the court maintained its dignity and its moral influence and was responsible for the observance of religious ritual.

Of other officials only bare mention can be made of the Harbour Commissioners (Civil), the Wardens of the War Harbour, the Water Board, the Inspectors of Weights and Measures, the Controllers of the Market, the Commissioners of Police and of Prisons.

The  
Judiciary From the Executive we pass to the Judiciary and the administration of justice. In this sphere Athenian Democracy was perhaps seen at its worst. If, however, it failed it was not from lack of courts nor from paucity of jurors, but rather from neglect of the strict rules of law, and from the fatal error of permitting political prejudices and private passions to intrude upon the austere domain of judicial administration. Verdicts were too often given not in accordance with law but in deference to sentiment if not actually under the influence of corruption. Small wonder that Aristotle should insist, almost to the point of tedium, upon what to us seems a commonplace. 'Surely the ruler cannot dispense with the general principle which exists in law; and he is a better ruler who is free from passion than he who is passionate' (*Politics*, iii. 15. 5). And again: 'He who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire.'<sup>2</sup> Above all, the judges should act only as interpreters of law: 'laws when good should be supreme; the magistrate should regulate those matters only on which the laws are unable to speak with

<sup>1</sup> Aristotle, *Politics*, v. 4.

<sup>2</sup> *Ibid.*, iii. 16. 5.

precision owing to the difficulty of any general principle embracing all particulars.' <sup>1</sup>

To turn, however, to the actual organization of the Judicature at Athens. Of Judges there were three classes: the permanent judges, who formed the Council of the Areopagus; the Arbitrators; and the Heliasts or Dicasts. No less than five Courts were competent to judge varying degrees of homicide from wilful murder to manslaughter and accidental killing. These courts were presided over by the permanent judges. Civil suits came as a rule before the public arbitrators who formed a judicial corporation composed of Athenian citizens who, on attaining their sixtieth year, were relieved of the duty of military service. They served for a year and decided cases without a jury. From the decisions of an individual arbitrator an appeal lay to the general body of arbitrators or to the Heliastic Court.

The Heliaca was the supreme court before which all offences liable to public prosecution were tried. The judges or jurors—for the functions were confused—consisted of 6,000 <sup>2</sup> citizens above the age of thirty and chosen by lot from the general body of citizens. After the time of Pericles the Heliastic Court was subdivided into ten panels of 500 each, with 1,000 dicasts held in reserve to fill vacancies. The verdict was given by a ballot vote. This democratic procedure was almost a *reductio ad absurdum* of judicial administration, and in time engendered scandals of the gravest character. The courts became infested by professional sycophants who reaped a rich harvest from blackmail and similar nefarious practices. It was this parody of justice which evoked the bitter satire of Aristophanes, and inspired the grave warnings already quoted from Aristotle.

The  
Heliaca

Yet with all its defects the Government of Athens attained a standard of administrative efficiency such as,

<sup>1</sup> iii. 11. 19.

<sup>2</sup> This is the round number given by Aristotle (*Ath. Const.* 24), and cf. Aristophanes, *Wasps*, 660.



down to that day, the world had never known. With a legal system remarkable not less for its elasticity than for its essential 'legality', the Athenians developed also a system of finance, of justice, and of military and naval administration which, compared with any previously known, was indeed remarkable. Even more remarkable was the wide diffusion of culture and education resulting from the political apprenticeship served by the Athenian citizens in the *Demi* or parishes, which represented the units of local administration.<sup>1</sup> Athenian Democracy was indeed an heroic experiment to which modern civilization owes a debt literally beyond computation. No more splendid attempt to reconcile personal liberty and public order has ever been made. Politically the experiment failed, and the causes of its failure have become the commonplace of historical criticism and political philosophy. This book is concerned with Politics, not with Ethics or Aesthetics, yet even a politician may appreciate and be permitted to emphasize the debt which mankind owes to a political failure. The day of Hellenic efflorescence was, as measured in the history of the ages, brief; but, as Ben Jonson sang,

It is not growing like a tree  
In bulk, doth make men better be;  
Or standing long an oak, three hundred year,  
To fall a log at last, dry, bald, and sere:  
A lily of a day  
Is fairer far, in May,  
Although it fall and die that night;  
It was the plant and flower of light.  
In small proportions we just beauties see;  
And in short measures, life may perfect be.

The life of a people who produced Pheidias and Praxiteles, who could laugh with Aristophanes and weep with Aeschylus and Sophocles, who sat at the feet of Socrates and Aristotle, who applauded Demosthenes and accepted the

<sup>1</sup> The reorganization of the *Demes* was due to Cleisthenes. Cf. Arist. *Ath. Const.*, § 21.

rule of Pericles, such a life may be pronounced perfect, if ever human life can be. And if the life of Athens was brief the product of that life is immortal. In the *Hymn to the Delian Apollo* there is a description of the Ionians assembled at their festival: 'Whosoever should meet them at that gathering would deem that they were exempt from death and age for ever, beholding their gracious beauty and rejoicing in heart at the sight of the deep-girdled women.' The description is true of the creations of Greek art and Greek literature: they are exempt from age and death. But the form of the Greek polity has perished.<sup>1</sup> Yet no student of Aristotle can ignore the intimate connexion between the form of the polity and the character of the individual citizen; between the characteristic features of Greek Democracy and the characteristic features of Greek literature and Greek art. It is the audience which makes the play, and evokes the sublimest effort of the orator! Life in Athens, if contracted, was intense. Nowhere in world-history has intellect played more freely upon intellect, and wit more constantly sharpened wit. Nor was there among the citizen class any inequality of opportunity. 'Neither', says Pericles, 'is poverty a bar, but a man may benefit his country, whatever be the obscurity of his condition.' 'To avow poverty with us is no disgrace; the true disgrace is in doing nothing to avoid it.' 'We are lovers of the beautiful, yet simple in our tastes, and we cultivate the mind without loss of manliness. Wealth we employ, not for talk and ostentation, but when there is real use for it.' In these few but pregnant sentences we penetrate the secret of the social and intellectual life of Athens.

Politically, however, we are compelled to record transient success followed by failure, and failure ending in obliteration.

One question remains to be asked and if possible to be answered: how far does the failure of Athens to maintain

<sup>1</sup> I do not ignore the examples, e. g., of Geneva and Hamburg; but the generalization remains substantially true.

its national independence involve a condemnation of that system of Direct Democracy of which Athens was incomparably the most brilliant exemplar ?

Direct Democracy, it is proper to observe, can hardly exist, much less succeed, save under peculiar and appropriate conditions. If the whole body of citizens are to be not merely the ultimate depositories of sovereignty, but actually and individually members of the legislature, the executive, and the judiciary, to say nothing of the army and the navy, two conditions would seem to be essential : the size of the State must be strictly circumscribed, and the economic wants of the citizen community must be supplied by non-citizen labour. Obviously also the State must be sufficiently organized for purposes of defence to enable it successfully to resist external attack. Apart from the assaults of external enemies the Athenian State ultimately succumbed to an exaggerated passion for equality. Democracy was destroyed by its own inherent principle. Payment for attendance in the *Ecclesia* and the Heliastic Courts removed the disabilities of poverty, while inequalities of ability were cancelled by the substitution of appointment by lot for the filling of offices by election. Well might Aristotle despairingly insist that if such practice was to prevail the citizen class must be still further limited to men of 'complete virtue' and complete leisure, and that not slaves only but all who pursued professional, commercial, or manual avocations must be severely excluded from the ranks of citizenship. The nemesis which waits upon the exaggeration of principles, sound in themselves, could not have been permanently evaded by the Athenian polity. For a time decadence was arrested by the emergence of a great man and a great ruler in the person of Pericles. With his death Athenian greatness suffered eclipse.

It is difficult to resist the conclusion that the success of Greek 'democracy' was in fact due not to the democratic principle, but to those elements of aristocracy which Greek democracy retained, and in particular to the

economic substratum provided for the free community by the institution of slavery. In proportion as the principles of pure democracy successfully asserted themselves the greatness of Athens declined, the decline being temporarily arrested by the willing acceptance of the autocracy of Pericles. Support for this conclusion comes from a quarter so unexpected that the temptation to cite it is irresistible :

' If', wrote Mr. and Mrs. Sidney Webb, ' Democracy means that everything which " concerns all should be decided by all ", and that each citizen should enjoy an equal and identical share in the government, Trade Union history indicates clearly the inevitable result. Government, by such contrivances as Rotation of Office, the Mass Meeting, the Referendum and Initiative, or the Delegate restricted by his Imperative Mandate, leads straight either to inefficiency and disintegration, or to the uncontrolled dominance of a personal dictator or an expert bureaucracy.' <sup>1</sup>

In Athens Direct Democracy led straight to disintegration. A reaffirmation of the same principle would seem likely to lead to similar results in the modern world. Among modern States there is, however, one which has retained much of the spirit and something of the practice of Direct Democracy without loss of self-esteem, without hurt to its prestige among the Powers, and without any infringement of national independence. The circumstances of modern Switzerland are, however, so peculiar that they demand detailed investigation. To that investigation the next chapter will be devoted.

<sup>1</sup> *Industrial Democracy*, i, p. 39.



## IV. REFERENDAL DEMOCRACY

### *The Swiss Confederation*

'La Suisse ne ressemble à aucun autre État, soit par les événements qui sont succédés depuis plusieurs siècles, soit par les différentes langues, les différentes religions, et cette extrême différence de mœurs qui existe entre ses différentes parties. La nature a fait votre État fédératif, vouloir la vaincre n'est pas d'un homme sage.'—NAPOLÉON I.

'Switzerland must be regarded as the best equipped political laboratory in the modern world. . . . There is no other state whose constitutions, federal, provincial, communal, express such implicit confidence in the present will of the majority and admit such facility of fundamental changes to meet new conditions.'—J. A. HOBSON.

'Switzerland is the most remarkable case of a Federation formed by historical causes, in the very teeth, as it might seem, of ethnological obstacles. Three races, speaking three languages, have been so squeezed together by formidable neighbours as to have grown into one.'—JAMES Bryce.

'The territory of the Swiss Confederation is both in a military and a political point of view one of the most important in Europe. . . . But disunion seems stamped upon the soil by the very hand of nature. . . . The Federal system has here out of the most discordant ethnological, political, and religious elements raised up an artificial nation full of as true and heroic national feeling as ever animated any people of the most unmixed blood.'—E. A. FREEMAN.

'In respect of continuity of development the Swiss federation is to the federal type almost what England is to the unitary type. And the medieval growth and development of the Swiss confederation is one of the few stories in later European history which has rivalled in dramatic interest the struggles of Greeks and Romans against foreign enemies.'—HENRY SIDGWICK.

'INCONTESTABLEMENT c'est la Suisse qui marche en tête de l'évolution démocratique.'<sup>1</sup> To an Englishman, a Frenchman, or an American, each accustomed to regard his own distinctive type of government as leading the democratic van, the claim thus put forward by M. Bonjour, on behalf of his own country, must, at first sight, appear startling, if not grotesque. Yet candour demands

Democracy, direct and indirect

<sup>1</sup> *La Démocratie suisse*, by Félix Bonjour, sometime President of the Swiss Confederation, 1919, p. 1.

fair consideration for the claim. Is it, in any sense, admissible? A closer examination will probably reveal the fact that the answer to this, as to so many other questions, will be found to depend largely on the definition of terms.

To the direct democracy of Athens there is, among the States of the modern world, no exact parallel. Nor are the conditions which contributed to the success of that experiment ever likely to be precisely reproduced. The nearest parallel to the Greek city-state is now to be found, from one point of view, in the city-states of Bremen and Hamburg; but nowhere is the essential *ethos* of Greek Democracy so faithfully preserved as among some of the Swiss cantons, and indeed in the Helvetic Confederation as a whole.

In attempting to appraise fairly the value of M. Bonjour's complacent aphorism it is essential to remember that by Swiss publicists the term 'democracy' is invariably employed as the antithesis of 'representative government'. An Englishman is apt to regard the two principles as virtually identical, and is, therefore, startled to come across such a passage as the following: 'Soon after 1860 a perfect wave of *democracy* seemed suddenly to sweep over the country, carrying all before it, and in a very short space of time the *representative system* was ousted from the position which up to that time it had succeeded in maintaining.'<sup>1</sup> Similarly M. Bonjour himself: 'In small communes the system is democratic, and in large communes representative.' A third writer, Gengel, with obvious reference to Rousseau, puts the point explicitly: 'To say that popular sovereignty and universal suffrage are one and the same thing is ridiculous. Once the elections are past the electors have no possible influence over the Chamber.' To admit this antithesis, so familiar to the Swiss, as indeed to all disciples of the Genevan philosopher, demands from Englishmen, accustomed to regard representation as the adjunct and

<sup>1</sup> Deploige, *Referendum in Switzerland*, pp. 82, 83.

complement of democracy, a radical readjustment of their political preconceptions. The admission is, however, a necessary preliminary to the study of Swiss Democracy, and it must, therefore, temporarily and tentatively, be made.

The first lesson to be derived from a study of Swiss Democracy tends to reinforce one of the oldest maxims of political science, the relativity of all its conclusions. There is no absolutely best in constitutions; the best constitution is that which has been gradually evolved by the people who live under it, and which is most closely adapted to their peculiar circumstances and conditions. The Swiss Constitution, or rather the twenty-six Swiss Constitutions, are pre-eminently the product of a long process of political evolution. Nor can these constitutions be understood or interpreted except by reference to the historical circumstances which have produced them.

The position of the Swiss Confederation in the general polity of Europe appears, at first sight, to be as anomalous as it is certainly unique. Tried by any of the ordinary political tests a product so apparently artificial would seem to have no right to exist. Yet it is safe to say that there is no European power whose future is more assured. Consisting to-day of twenty-five autonomous and sovereign States, it still seems to defy every canon known to political science; ethnology and geography, creed and language, history and policy combine to forbid the banns of political union among states and people so essentially diverse if not actually discordant. Yet Switzerland, compact of elements which own no common 'nationality', is a factor to be reckoned with in any estimate of the forces which go to make up the European economy.

Unique  
position of  
Switzer-  
land

Closer examination accentuates the sense of anomaly. Why should Ticino, for example, not form part of a happily united Italy? Geography seems to put a veto upon its union with Switzerland; race and language point to its union with Italy. Why should the Grisons not have added one more incongruous element to the composite Empire of the Habsburgs? Why should the



rest of the Swiss cantons not be divided—in very unequal proportions—between the two great nations whose language they speak and whose blood is in their veins ? For it is one of the most remarkable features of the Swiss Confederation that the geographical boundaries of the several cantons accurately correspond with distinctions of race and language. Eighteen of the cantons are exclusively German, five are French, one is Italian, and in one (Graubünden or the Grisons) one-third of the people speak Romansch. What compelling force has brought together geographical entities at once mutually heterogeneous, and internally homogeneous ? Such questions baffle the scientific historian. But the fact remains. Out of German-speaking folk and Frenchmen, out of Romansch-speaking people and Italians, there has been gradually built up a European 'power', small but not unimportant ; a State whose independence is assured ; a coherent though conglomerate nation.

Significance of  
Swiss Democracy

It is these facts which lend to the study of Swiss democracy a peculiar interest. No other State presents conditions at all parallel. It is no doubt true that Switzerland—a neutralized and non-aggressive power commanding the watersheds of Central Europe—is a political convenience, just as Poland was politically inconvenient. If Switzerland did not exist, it might be desirable, if not necessary, to invent it : yet invented, we may be sure, it never would have been. Though an artificial product, and now artificially protected by European guarantee, its gradual evolution was entirely spontaneous. And its governmental system is a reflex of its political history. There is not a single feature of the federal Constitution of to-day—the position of the President ; the composition of the Ständerat ; the execution of federal laws by cantonal officials ; the Referendum ; the Constitutional Initiative—which is not explicable by, and only by, the facts of its history in the past. Of that history, therefore, a short sketch is indispensable ; but there is one point which demands a preliminary word.

Included in the Swiss Confederation of to-day there are nineteen cantons and six demi-cantons, each of which claims within its own sphere of jurisdiction to be sovereign. There is therefore, as critics insist, 'not one democracy in Switzerland; there are as many democracies as there are cantons and demi-cantons'. Consequently we have to study not one constitution but twenty-six. Each of these democracies has a history of its own, and each would repay study, but we must concern ourselves primarily with the central government. The evolution of that curious political formation which to foreigners is known as Switzerland falls into seven clearly marked stages.

The first is marked by the conclusion of *The Perpetual League of the three Forest Communities* (1291): Uri, Schwyz, and Unterwalden. This Swabian League was one of the many leagues formed for mutual protection in the later Middle Ages within the jurisdiction of the Germanic or Holy Roman Empire. The 'Old League of High Germany' expanded during the first half of the fourteenth century into the *Confederation of Eight Cantons*. This remarkable expansion was in large measure due to the resounding victory won by the peasants of the Forest Communities over the Habsburg Count on the memorable field of Morgarten (1315). Morgarten with the almost contemporary fights at Bannockburn and Crécy sounded the death-knell of feudalism as a military system. It also baptized in blood the infant Confederation, born of the Perpetual League. The victory naturally brought fresh adherents to the League: Lucerne (1332), the Imperial City of Zürich (1351), Glarus and Zug (1352), and the Imperial City of Bern (1353). The new Confederacy won two great battles against the Habsburgs, at Sempach (1386) and at Näfels (1388), with the result that all political allegiance to the Habsburgs was in 1394 finally renounced. The Confederacy and its 'cantons' (to anticipate a convenient term) became in their turn lords and conquerors. Appenzell was reduced to subjection in

The Old  
League of  
High  
Germany,  
1291-1353

The Con-  
federation  
of Eight  
Cantons,  
1353-1513

1411, and St. Gallen, parts of the Valais, Aargau, and Thurgau in the course of the fifteenth century. But these territories, be it noted, came in as subjects, not as confederates. The cities of Freiburg and Solothurn were, however, admitted to the Confederacy in 1481, Basel and Schaffhausen in 1501, while in 1513 Appenzell was raised from dependency to membership. This Confederacy of thirteen cantons subsisted from 1513 until the French conquest in 1798.

The Con-  
federation  
of  
Thirteen  
Cantons,  
1513-1798

The tie between the confederated cantons was of the loosest possible kind. When occasion demanded they sent their envoys to a Diet, but the functions of the Diet were purely consultative; the envoys were instructed *ad audiendum et referendum*, but all decisions as to policy had to be referred to the confederate States. The tie, never close, was further weakened by the Reformation, and by disputes as to the disposal of conquests. These conquests brought not only Germans but Italians (in Ticino) and French-speaking Savoyards, not into the bosom of the Confederacy, but under the dominion of its several component members. The confusion caused by the divergent and anomalous position of these 'subject lands', 'associated districts', 'protected lands', and 'common bailiwicks' was still further deepened by the contrasts in governmental methods presented by the cantons themselves: the peasants of the Forest cantons still 'ruling and being ruled' according to the methods of direct democracy in their *Landsgemeinden* or general assemblies; the patricians of Bern, Lucerne, Freiburg, and Solothurn organized in the most exclusive of oligarchies; and the burghers of Zürich, Basel, and Schaffhausen upholding the principles and maintaining the forms of civic democracies.

Over this confused conglomeration of sovereign communities, this medley of races and tongues, there passed in the last years of the eighteenth century the steam roller of Napoleon's armies.

Napoleon  
and Swit-  
zerland

That the ideas proclaimed by the French Republic

should have created much ferment in 'French' Switzerland, particularly in the city of Geneva, is not remarkable. Still less is it remarkable that the eye of a master strategist should have been fixed from the outset of his career upon the peculiarly advantageous position of the confederated States. The opportunity for intervention was not unduly delayed. Hardly had Bonaparte set up the Cisalpine Republic (1797) than he was confronted by a deputation from the Valtellina, Chiavenna, and Bormio, which were at that time subject to the Grisons, imploring his protection against their masters, and asking for admission to the Cisalpine Republic. Bonaparte forthwith ordered the Grisons to concede independence to the Italian provinces. The Grisons displayed, not unnaturally, some hesitation before accepting such disinterested advice. Brief as the hesitation was, it sufficed for an excuse, and Bonaparte, lending a gracious ear to the tale of oppression, incorporated the provinces in his new Republic. 'No State', as he wrote to the Grisons, 'could without violence to civil and natural rights, hold in permanent subjection another State.' The strategical importance of the Valtellina had been recognized by France at least since the days of Richelieu, but here, as elsewhere, Bonaparte was the first to realize the dreams of the cardinal-minister. Not less important was the route through the Valais between France and Lombardy. The discontent in French Switzerland offered an obvious opportunity for the realization of a military project. Nor did Bonaparte hesitate to seize it. A movement on the part of the Vaudois democrats against the Bernese patricians was sedulously stimulated from Paris; in March 1798 General Brune occupied Bern on behalf of the Directory; the prosperous city was compelled to disgorge treasure amounting to upwards of 25,000,000 francs; the Helvetic Republic was, as we have seen, proclaimed, and, in all but name, Switzerland became a dependency of France.<sup>1</sup>

<sup>1</sup> Fournier, *Napoleon* (Eng. trans.), i. 141 seq.

The  
Helvetic  
Republic,  
1798

The Constitution, drafted by the democratic leader Peter Ochs of Basel, and imposed upon Switzerland by French arms, was closely modelled upon the French Directorial Constitution of the year III. The unified Republic was divided into twenty-three cantons,<sup>1</sup> and each canton was placed under a Prefect who represented the central Government. The seat of the central Government was fixed at Lucerne. The central legislature consisted of two chambers: a Grand Council consisting of deputies indirectly elected by the several cantons in proportion to population, and a Senate composed of four delegates from each canton. The executive authority was vested in a Directory of five members, elected by the two chambers in joint session. With the Directors were associated four heads of administrative departments. A tribunal was also erected to act as the supreme judicial authority for the whole Republic; criminal law was systematized and unified throughout the Republic; the same principle of uniformity was applied to the coinage and the postal system, and a common Swiss citizenship was established. But this was not all. Mere constitutional and legal readjustment would have been deemed strangely inadequate by a generation which had imbibed the teaching of Rousseau. The doctrine of the sovereignty of the people was accordingly proclaimed; the principles of civil equality and liberty of conscience were enforced; and all privileges, rights, and burdens, alike feudal and ecclesiastical, were summarily abolished. In fine, the fruits of ten years of revolution in Paris, together with all the hard-won experience of constitutional experiments, were generously bestowed upon the Swiss people.

The irony of the situation was that nothing could have been less congenial to the liberated peoples. Liberty and equality had to be forced upon them at the point of French bayonets. Nor is the reason of their ingratitude far to seek.

'The Constitution of the Helvetic Republic of the 12th of April 1798 respected', writes Deploige, 'neither the antiquity

<sup>1</sup> The term *canton* was now, for the first time, officially employed.

of the *Landsgemeinden* nor the independence of the small republics of Central Switzerland. . . . The French spoke to them of liberty, of equality, of the sovereignty of the people, and of political emancipation. What meaning had such language for these mountaineers, already sovereign legislators, and free as the eagle that soared over their own Alpine snow heights, ignorant of the meaning of feudal privileges, and emancipated for centuries from the rule of monarchs and aristocrats? They perceived merely the emptiness of all these promises, and felt the hollowness of the revolutionary phraseology. Their fathers had founded a genuine democracy; the democracy the invader would establish was only a theory on paper. A more pertinent argument, a more touching appeal than that addressed to the French Directorate on the 5th of April 1798 by the people of Switzerland would be hard to find. "Nothing", it ran, "can in our eyes equal the misfortune of losing the Constitution which was founded by our ancestors, which is adapted to our customs and needs, and which has for centuries enabled us to reach the highest attainable point of comfort and happiness. Citizen directors, if you should have really come to the determination to change the form of our popular governments, allow us to address you on the subject with frankness and freedom. We would ask you if you have discovered anything in our constitutions which is opposed to your own principles? Could any other conceivable form of government put the sovereign power so exclusively in the hands of the people, or establish among all classes of citizens a more perfect equality. Under what other constitution could each member of the state enjoy a greater amount of liberty? We wear no other chains than the easy fetters of religion and morality, no other yoke than that of the laws which we have made for ourselves. In other countries, perhaps, the people have still something to wish for in these respects. But we, descendants of William Tell, whose deeds you laud to-day; we, whose peaceful enjoyment of these constitutional privileges has never been interrupted up to the present time, and for the maintenance of which we plead with a fervour inspired by the justice of our cause, we have but one wish, and in that we are unanimous; it is to remain under those forms of government which the prudence and courage of our ancestors have bequeathed as a heritage; and what government, citizen directors, could more accord with your own?

“ We who address you are inhabitants of those countries whose independence you have so often promised to respect. We are ourselves the sovereigns of our little States. We appoint and dismiss our magistrates at will. The several districts of our cantons elect the councils which are our representatives, the representatives of the people. These are, in short, the very foundations of our constitution. Are not your own identical ? ” <sup>1</sup>

The pathos of this appeal is equalled only by its simplicity. None but the simplest could have supposed that the Helvetic Constitution was devised solely, or indeed primarily, in the interests of the citizens of the new Republic. At the same time the force of the sentiments expressed in the above letter was not equally distributed throughout the several cantons. To the inhabitants of the subject-Provinces the unified Constitution did mean political emancipation and the concession of equal rights. It was far otherwise in the Forest Cantons, which still adhered to the primitive form of their ‘ direct ’ democracies. Consequently, when all the other cantons had—some with greater and some with less reluctance—made their submission and accepted the Helvetic Constitution, the Forest Cantons maintained a stubborn resistance. Nor until they had received a guarantee of their primitive liberties did these courageous mountaineers agree to abate their opposition to the armies of France.

*Military  
Convention with  
France,  
1799*

There was more than a little justification for their suspicions. The real significance of the Helvetic Constitution was quickly disclosed. Geneva was annexed to France, and the Swiss people, already taxed up to the hilt, were compelled, in 1799, to conclude an offensive and defensive alliance with the French Republic. The high road through the Valais into Italy was further to be kept open to the merchandise and troops of France. A similar engagement was concluded in reference to the road along the Rhine to the Lake of Constance—a road which gave the French armies access into the heart of Germany.

<sup>1</sup> Deploige, *Referendum in Switzerland*, pp. 18, 19, 20.

What this convention meant, in a military and political sense, was clearly revealed in the war of the Second Coalition (1798-1800), and more particularly in the campaign which culminated in the resounding victories of Marengo and Hohenlinden. The Archduke Charles had achieved a brilliant victory on the upper Rhine in the early part of 1799. Even more brilliant were the achievements of Marshal Kray and General Suvaroff in north Italy. But both successes were rendered barren by the fact that France, thanks to the occupation of Switzerland, held the key of the strategical position. While Suvaroff was fighting his way through the St. Gothard, Masséna inflicted a crushing defeat upon the Russians under Korsakoff at Zürich (26 September), and Suvaroff was compelled to abandon the fruits of a most brilliant military achievement and to effect a speedy retreat.

Meanwhile, the Swiss peasants, whose land had become the cockpit of Europe, were reduced to a condition of abject misery. Masséna, hailed as the 'Saviour of Switzerland', levied enormous contributions from the richer cantons. Basel had to pay 1,400,000 francs, Zürich 800,000, St. Gall 400,000. Bread was selling at fifteen sous a pound; even the rich were reduced to short rations; the poor starved. Thousands of children wandered about homeless and half-clad, until they were rescued by public charity.<sup>1</sup>

'The small cantons', wrote Pichon, the French minister, in November 1799, 'are a wilderness. The French army has been quartered three or four times between Glarus and the St. Gothard within six months. . . . The soldier has lived upon the provisions of the inhabitants. . . . As our troops did not obtain a single ration from France, everything was eaten up six months ago, even before the 25,000 Russians invaded this devastated region. Urseren alone has fed and lodged in one year some 700,000 men. . . . The richest cantons are all oppressed by requisitions and have succumbed under the load of quartering men and feeding soldiers and horses. . . . Every-

<sup>1</sup> Daguet, *Hist. de la Conféd. Suisse*, ii. 330.



where there is lack of fodder. . . . Everywhere the cattle are being slaughtered.' <sup>1</sup>

Parties in  
Switzer-  
land

Domestic strife intensified the miseries caused by a foreign military occupation. The French party was at war with the autonomists; democrats strove with oligarchs; federalists with unionists; 'Jacobins' with 'Girondins'. Even the *coup d'état* was naturalized on Swiss soil: effected now in this interest; now in that; sometimes genuinely 'native'; more often stimulated and engineered from Paris.

The Sim-  
plon road

Bonaparte, meanwhile, was steadily pursuing his own projects. Twice already he had demanded from the Helvetic Republic the cession of the Valais in order to secure his communications with Italy. Now, waiting for no leave, he proceeded to construct the magnificent road over the Simplon. The sorry farce of an independent Republic was approaching its denouement, and Bonaparte was nearly ready for the next step. In Switzerland itself federalists and unionists were hopelessly at loggerheads, and in 1806 a constitutional amendment was submitted for the approval of the First Consul at La Malmaison. The project was too unitary for his taste; a different scheme was substituted, and was submissively accepted by the Swiss legislature (29 May 1806).

The Pro-  
jet de la  
Mal-  
maison

This Constitution known to Swiss jurists as the *Projet de la Malmaison* represented on paper some small concession to traditional prepossessions in favour of local autonomy. It recognized nineteen cantons, the Valais and the Grisons being included, and to each it granted a considerable amount of independence, especially in matters of education and finance. Over each canton there was to be a Prefect who was to be instructed to administer its affairs with due deference to local customs, and in accordance with local requirements. The unitary principle, on the other hand, was represented by a central legislature of two Chambers: a Diet of seventy-seven,

<sup>1</sup> Oechsli, W., *Quellenbuch*, p. 468, quoted by MacCracken, p. 312.

and a Senate of twenty-five members, and by a Central Executive. The latter was vested in a chief magistrate, known as a *Landammann*, who was to be chosen from the Senate and to be assisted by a council of four members.

The compromise attempted in the Malmaison Constitution afforded no permanent solution of the Helvetic problem, and after a period of misery and anarchy Napoleon decided to intervene.

For the Swiss people Napoleon was not without a touch of sympathy if not of sentiment. He appreciated the peculiarities of their situation, both internal and in relation to the European polity. It was in reference to Switzerland that he enunciated an aphorism of general validity :

‘ Une forme de gouvernement qui n’est pas le résultat d’une longue série d’événements, de malheurs, d’efforts, d’entreprises de la part d’un peuple, ne prendra jamais racine.’

The dogma is profoundly true : and Napoleon not only recognized its truth, but acted upon it. The experience of the years 1798–1802 made it abundantly clear that the ‘ Swiss ’—the German, French, and Italian peoples combined by a freak of nature or of circumstance—were not going to settle down in acceptance of a unified Republic. Consequently, in 1803, Napoleon, now First Consul of France, announced his desire to mediate. Delegates from the various parties in Switzerland were summoned to Paris, and a new Constitution known as the Act of Mediation was drawn up (19 February 1803).

The *Act of Mediation* was a distinct improvement upon the *Helvetic Republic*. It recognized the sovereignty of the cantons, adding to the original thirteen six new cantons representing the allied and subject lands, such as Vaud, Ticino, and Grisons. Into the new cantons the principle of representative democracy was introduced ; the old ones were divided into rural cantons with their primitive *Landsgemeinden* and urban cantons under burgher aristocracies. Upon the ‘ sovereign ’ cantons,

The Act of  
Mediation,  
1803–14

new and old, was superimposed a central government with a federal Diet, a federal army, and federal taxation.

For the next ten or twelve years Switzerland was little more than an appendage of the Napoleonic Empire. Indeed in 1811 the Emperor appears to have contemplated the erection of a kingdom of Helvetia for the Elector Charles of Baden, the husband of his adopted daughter Stéphanie de Beauharnais. The Swiss were spared this culminating affront, but they were brought into the net of the 'continental system', and the trade of their towns was ruined.

On the fall of Napoleon the *Act of Mediation* lapsed, and a new Constitution known as the *Federal Pact* was, after bitter controversies and prolonged gestation, produced, and was approved at Vienna by the great Powers by whom the independence and neutrality of Switzerland was guaranteed.

The Federal  
Pact,  
1815-48

The *Federal Pact* was essentially centrifugal in character: it recognized the sovereign rights of the cantons, now increased to twenty-two by the inclusion of Valais, Geneva, and Neuchâtel; it set up a Diet of twenty-two delegates—one from each canton; it invested with a sort of presidential authority the three principal cantons, Zürich, Bern, and Lucerne, each of which was to act in turn as convener and the seat of government for periods of two years; and made provision for a federal war chest and a federal army. The compromise embodied in the *Pact* was not satisfactory; it impaired the independence of the cantons without substituting for it the vigour derived from a strong centralized administration; above all, it did nothing to heal the jealousies nor compose the antagonisms which, between 1815 and 1848, seemed likely permanently to break up the incipient and imperfect unity of the Confederated States. Consistency and continuity of policy, whether foreign or domestic, could hardly be expected of a Government which biennially shifted the centre of political power and the seat of administration, while the Diet proved itself hopelessly

ineffective even for the performance of the limited functions entrusted to it by the *Pact*.

That the overthrow of 'Legitimacy' in France should have engendered excitement among the Swiss republics is somewhat curious, yet the fact is unquestionable. Between 1830 and 1848 no fewer than twenty cantons revised their Constitutions. The doctrines of the sovereignty of the people and the separation of powers were solemnly proclaimed; universal suffrage was introduced; the right of petition, freedom of trade, of conscience, and of the press was adopted; a powerful impulse was given to education: normal and secondary schools were established, and the High Schools of Zürich and Bern were erected into universities; above all, the 'veto' was instituted, in various forms, in five cantons, while one—the canton of Vaud—established in its widest form the popular 'initiative'.

Despite constitutional changes of high significance in the cantons there was almost perpetual discord in the Confederation, and in 1843 actual secession was threatened by the *Sonderbund*, or League of Seven Roman Catholic Cantons. The *Sonderbund* received cordial encouragement from the absolutist Powers of the Continent, then under the domination of Metternich, and even Guizot and Louis-Philippe looked kindly upon it. Palmerston, not sorry to have an opportunity of settling scores with France and Austria, vigorously espoused the cause of the 'progressive cantons'. Civil war broke out in 1847, but a brief and almost bloodless campaign sufficed to decide the issue. The *Sonderbund* was dissolved, the reactionary Governments in Lucerne, Valais, and Freiburg were replaced by Liberals, and the interference of foreign States in the internal affairs of the Confederation was firmly and finally repudiated.

The  
Sonder-  
bund

The outbreak of the continental Revolution of 1848 relieved Switzerland from all fear of further interference at the hands of autocratic neighbours, and left her free to carry out a radical revision of the makeshift Constitution of 1815.

The scheme adopted in 1848 was extensively amended in 1874, but it still forms the basis of Swiss government.

The Con-  
stitution  
of 1874

Under this Constitution the government of Switzerland and its cantons is at once genuinely democratic and genuinely federal. It is commonly affirmed that federalism implies duality of sovereignty, and it may certainly be said of the national and the cantonal Governments of Switzerland that each within its own sphere is sovereign. As a fact, however, sovereignty is vested in the people who exercise it, alike in national and cantonal affairs, by means of the veto, the popular initiative, and in some cases by the more extreme methods of the 'recall'. It is the more necessary to insist upon the diarchic character of the Swiss government because many observers have been apt to suppose and to insist that cantonalism is everything and nationalism nothing among the Swiss. Yet the larger patriotism exists and grows steadily, if not to the exclusion of, at least side by side with, the lesser. True federalism implies both; and in the course of the last seventy years Switzerland has attained to it. Down to 1798 the cantons were united in a mere *Staatenbund*—hardly more than a perpetual league of independent States; they now form a real *Bundesstaat*—a federal State—with highly developed organs appropriate thereto.

The Legis-  
lature

Of these the most important is the Legislature. There is not in the Swiss Constitution so strict a separation of powers as there is in the American. Switzerland is less faithful to the doctrine of Montesquieu than to that of Rousseau. But the Legislature is more strictly federal than the Executive. Like the Imperial Constitution of Germany, the Swiss has assigned to the central legislature a large sphere in the making of laws while leaving it to the local Governments to carry them into execution. The main business of the Central Executive—the Federal Council—is to see that the cantonal officials do their duty. Should any conflict arise between the two authorities the Federal Council has two weapons ready to hand, both rather clumsy but among the frugal Swiss not ineffective :

it may withhold the subsidies due to the recalcitrant canton, or it may quarter troops upon it.

In structure the Federal Assembly is bicameral, consisting of a National Council or House of Representatives and a Council of States. The National Council represents the people; the Council of States, like the American Senate and the German Reichsrat, represents the constituent cantons or States. The former contains some 200 members representing over 50 constituencies. The electoral districts are as equal as conditions permit, but every canton must have at least one member, and districts may not cut across cantonal frontiers. The franchise is extended to all males not under twenty years of age, unless they have been deprived of political rights by the laws of their own canton, but as all cantonal Constitutions must now be guaranteed by the Federal Legislature, and as the latter insists that the cantons must assure to their citizens the exercise of political rights, the franchise cannot be arbitrarily withheld. It is noticeable, however, that the country which is in the vanguard of democracy contains only 900,000 electors out of a population of 3,885,500, or less than 1 in 4, while in the United Kingdom the proportion is about 1 in 2½. As regards the method of election, the principle of Proportional Representation was, after two vain attempts, adopted by popular initiative in October 1918, 19½ cantons having voted in its favour, whereas in 1910 a majority of the cantons withheld their support. The National Assembly ordinarily meets twice a year, for four weeks, in June and December; members of the National Council receiving 20 fr. a day from the national treasury, while the wages of members of the Ständerat are paid, quite logically, by the cantons.

The Ständerat consists of forty-four members, the cantons—large and small—being equally represented by two members apiece, the demi-cantons by one. Like the American Senate it embodies the *federal* as opposed to the *national* principle, but unlike the Senate it has no special functions which differentiate it from the 'lower' House.

The initiation of legislation belongs equally to both Houses, and is in fact divided between them by their respective presidents at the beginning of each session. In every respect the authority and function of the two Houses are co-ordinate ; in the exercise of certain electoral and judicial functions—as for instance in the election of federal councillors—they act as a single Assembly in joint session.

The Federal Assembly is in no sense a sovereign Parliament ; not only is its authority shared with the cantonal legislatures, but it is constantly liable to be negatived and even superseded by the direct political action of the electors. To this point we shall return. Meanwhile, the other organs of the central Government demand brief notice.

The  
Federal  
Council

The position of the Executive is to Englishmen peculiarly interesting. Executive authority resides in the Federal Council, a body of seven members elected by both Houses in joint session, nominally for a period of three years or for the duration of the Federal Assembly. Not more than one member may come from any one canton. The seven principal departments of State—Foreign Affairs, the Interior, Justice and Police, War, Finance and Customs, Industry and Agriculture, Posts and Railways—are allotted by mutual arrangement among the seven councillors, one of whom is annually elected president and another vice-president of the Confederation. Nominally the departmental offices are reallocated annually ; as a fact they are almost invariably held for life. Since 1848 there seems to have been only two cases of resignation on political grounds. Swiss democracy, says a modern critic, worships governmental stability and retains its public men in office even to the verge of senility.<sup>1</sup>

This is, however, the less remarkable if it be borne in mind that the Federal Council is not so much a Cabinet in the English sense, as a Committee consisting of the permanent heads of the Civil Service. It is not politically

<sup>1</sup> Bonjous, *op. cit.*, p. 198.

homogeneous, and its collective responsibility is doubtful, though the Constitution lays down (Article 103) that decisions shall emanate from the Federal Council as a body, and Deploige says that the Federal Council has always been considered to be unanimous in its decisions.<sup>1</sup> The administrative acts of the Council are supervised and may be reversed by the Legislature ; but reversal carries with it no censure and federal councillors never dream of resignation if their advice is not taken by the Federal Assembly. They exist in fact to carry out the wishes of the Legislature or the people as the case may be. Much more truly than the members of the Executive Council in Russia they might be described as the People's Commissioners. In neither House may they sit or vote ; but in both they may attend and speak when proposed legislation is under consideration, and in both they may be required to answer interpellations connected with the business of their several departments. Their right to attend and speak gives them, moreover, considerable influence over the course of legislation.

Except in regard to foreign and military affairs, customs, posts and telegraphs, and one or two other matters, the Council has no direct executive authority. Ordinary laws and judgements of the Federal Courts are carried out, as we have seen, by the cantonal authorities, though under the control and supervision of the Federal Council. The Council exercises, however, considerable judicial powers, especially in regard to those administrative matters which are by the Constitution excluded from the competence of the Federal Tribunal. There is in the Swiss Confederation a considerable amount of quasi-administrative law—perhaps a legacy of the Napoleonic occupation—but there are not, as in France, any special administrative tribunals ; jurisdiction in these matters belongs to the Federal Council.

The Presidency of the Swiss Confederation is held for twelve months only, virtually in rotation, by the members

The Presidency

<sup>1</sup> *Op. cit.*, p. 234.



of the Federal Council. The office has no political or administrative significance; the holder of it is merely the temporary chairman of the Federal Council and not in any real sense the chief magistrate of the Republic. The acts and decisions of the President—so far as they are not purely departmental—emanate not from him but from the Council as a whole. The President is not, therefore, in the position of an English Prime Minister: he is not a party chief even, nor a parliamentary leader; he can neither dismiss his colleagues nor dissolve the Legislature, nor control the Executive. Still less do his powers resemble those of a strong President in the United States of America; he is not even like the President of the French Republic, a constitutional ruler. Nevertheless he and his colleagues enjoy the confidence and command the respect of their countrymen by their devotion to duties which are at once exacting, unexciting, and inadequately remunerated.

The Ju-  
diciary

The Federal Council, as we have seen, possesses certain judicial powers; but there exists also a Federal Court of twenty-four judges appointed by the Assembly. The Court exercises both criminal and civil jurisdiction, but the competence of the Court in criminal matters is severely restricted and rarely exercised. In Civil matters the Federal Court acts as a Court of Appeal from the cantonal Courts in all cases arising under federal laws, if the amount involved exceeds 3,000 francs. It has primary jurisdiction in all suits between the Confederacy and the cantons, between canton and canton, and between individuals and the Government whether central or local. But its main function, according to Swiss jurists, is the exposition of Public Law, or Constitutional questions: conflicts of jurisdiction either between cantons or between a cantonal and the Central Government. It is, however, expressly provided that 'conflicts of administrative jurisdiction are to be reserved and settled in a manner prescribed by federal legislation'. The truth is, as already indicated, that the separation of powers is in the

Swiss Constitution far from precise, either as between the different organs of the Central Government, legislative, executive, and judicial; or between the Confederation and the cantons. On the latter point M. Félix Bonjour observes: 'The Swiss system is unique in that the spheres of the central authority and that of the cantons are not separated into water-tight compartments,' and he adds: 'Opportunities for friction are not lacking, but in normal times any difficulties which may arise are overcome with little effort.'<sup>1</sup>

One further point in relation to the Federal Judiciary demands emphasis. Unlike the Supreme Court of the United States that of the Swiss Confederation is not co-ordinate in authority with the Legislature. The American Court, if jurisdiction is invoked on application of a suitor, is bound to treat as void all laws whether enacted by the National or the State Legislatures if in its judgement such laws are inconsistent with the Constitution. In Switzerland, on the contrary, it is expressly provided that 'the Federal Court shall apply the laws passed by the Federal Assembly and the decrees of the Assembly which have a general bearing'. Other points of contrast are not lacking. The Swiss Court, unlike the American, has no power to decide the question of its own competence; in Switzerland there are not, as in America, federal tribunals in the States subordinate to the Central Court of Lausanne, nor has the Central Tribunal officers of its own to execute its judgements; for their execution it must rely upon the readiness and obedience of cantonal officials.<sup>2</sup> Should the canton or its officials refuse to carry out the judgements of the Federal Court or the order of the Federal Council the central authorities have no means of enforcing obedience save those to which reference has already been made. To an outside observer this would seem to place the Central Government in a position of humiliating dependence upon the cantons. But the

<sup>1</sup> *Op. cit.*, p. 23.

<sup>2</sup> Adams and Cunningham, *The Swiss Confederation*, p. 268.

judgement of the outsider matters little: what does matter is that the mutual relations of Confederation and cantons are the logical result of historical conditions, and accord entirely with the genius of the people and of the Constitution which they have evolved.

The Swiss  
Cantons

It remains, however, profoundly true and profoundly significant that a survey, however general, of Swiss Democracy ought to concern itself rather with the cantons than with the Confederation. The difficulty is that the cantonal Governments still present a bewildering variety of detail. Politically, as M. Bonjour observes,<sup>1</sup> 'Switzerland offers a picture almost as varied in its character as it does physically. All forms of government are or have been practised in Switzerland, and the results of all of them can be studied there at the present time.' It is this, indeed, which constitutes the value to be derived from a study of Swiss political institutions. 'The twenty-five more or less autonomous States which comprise the Confederation and this Confederation itself are', as he says, 'political laboratories always at work. They are all so many small nations animated by a desire to perfect their political organization and to develop their democratic institutions. They borrow from one another those forms of government which appear to succeed best.' On one principle, however, all the cantons are agreed. Since 1860 they have all, with the exception of Freiburg, accepted the principle of Direct Democracy.

Nevertheless, the acceptance of the principle still permits considerable latitude of interpretation. In the Old League of High Germany, dissolved in 1798, there were no fewer than eleven *Landsgemeinden*. There are still six survivals of this form of primitive and most direct democracy. The government of these cantons is still vested in the whole body of adult male citizens, and in at least one canton (Appenzell-Ausserrhoden) participation in the *Landsgemeinde* is a civic duty up to the age of sixty years, and non-attendance is punishable by fine.

<sup>1</sup> *Op. cit.*, p. 9.

Other cantons enforce the same principle by means of the *Referendum* and the *Initiative*. All the cantons save Freiburg and the six which have primary Assemblies (*Landsgemeinden*) have adopted both these devices.

The *Referendum*, in the cantons, assumes three forms : Compulsory, Optional, and Financial. All cantons are compelled, by federal law, to submit constitutional amendments to the popular veto. As regards ordinary legislation the compulsory *Referendum* prevails in German Switzerland ; the French and Italian cantons are content with the optional form. The financial *Referendum* is either compulsory or optional according to the canton. Of the laws or decrees submitted under compulsory *Referendum*, in the decade 1906-16, about 25 per cent. were rejected ; of those submitted, in the same period, under the optional *Referendum*, 229 were accepted and 73 rejected. 'The laws or decrees', writes M. Bonjour, 'which the people seem to have most difficulty in accepting are those fixing the remuneration of magistrates, officials, or employees, or creating new offices, new taxes, and laws which restrict individual liberty or appear to maintain privileges.'<sup>1</sup> Proposals are, however, not infrequently defeated on a first or second presentation and accepted on a third or subsequent occasion ; the veto in fact is suspensive rather than absolute.

The Cantonal Referendum

More directly democratic even than the *Referendum* is the *Popular Initiative*. This again is of two kinds : 'general' and 'formulated', and may be applied either to ordinary legislation or to constitutional amendments, or to both. It is set in motion by a prescribed number of electors ; 50,000 electors are required in the Confederation ; in the cantons the number varies according to population. A 'general' *Initiative* or 'motion' merely calls upon the Legislature to draft a law or a decree on a particular subject ; under the 'formulated' *Initiative* the actual terms of a Bill or a decree are

The Popular Initiative

<sup>1</sup> *Ibid.*, p. 110.

presented to the Legislature, which is bound to submit it, without amendment, to the vote of the people. All that the Legislature may do is to submit an alternative Bill or decree on the same subject, in which case the people may by *Referendum* accept either or reject both. This highly democratic device was first introduced by the canton Vaud in 1845, when the right of initiation was conceded to any 8,000 electors. It now extends to all the cantons except Freiburg and those which possess *Lands-gemeinden*, and even in Freiburg 6,000 citizens may call for total or partial revision of the Constitution. The results of the cantonal initiatives are far less subversive than might be anticipated. Out of thirty-six proposals initiated between 1905 and 1916 only ten were accepted. When these figures are compared with those of the *Referendum* it is manifest that 'the people is much more circumspect and discreet about proposals coming from one or another of its sections than about the laws and decrees passed by its representatives'.<sup>1</sup> There can, however, be no doubt that the mere existence of the *Initiative*, and the possibility of its employment, exercises a stimulating effect upon the Legislature, and it is not without significance that of late years the majority of constitutional amendments have been initiated not by the people but by the great councils.

The National  
Referendum

In the National Government the *Referendum* has been adopted both in the compulsory and the optional form, but not in the financial. Constitutional amendments, but those only, *must* be submitted to a popular vote; to ordinary legislation the veto may be applied on the demand either of eight cantons or of 30,000 electors. No Bill can become law unless it receives the assent both of a majority of the electors who take the trouble to vote and a majority of the cantons. Of the forty-five constitutional amendments proposed by the Federal Assembly between 1848 and 1925, twenty-nine were accepted and sixteen were rejected. The 'Optional *Referendum*' yields,

<sup>1</sup> Bonjour, *op. cit.*, p. 143.

as one would expect, somewhat different results. Between 1874 and 1924 a *Referendum* on ordinary Bills or decrees was demanded in thirty-six cases, and in twenty-three of these cases the opposition was successful. Not infrequently, however, the opposition has proved to be temporary; it has proceeded from an objection to the details rather than the principles of proposed legislation, and has been overcome when the objectionable details have been deleted.

The *Initiative* has been in operation in the Confederation for about thirty years. Down to 1925 twenty attempts were made by various sections of the people to secure a partial revision of the Constitution: in only five cases did they succeed. Among the unsuccessful attempts may be noted a proposal for the recognition of the 'right to work', which was rejected by 308,289 votes to 75,880; a proposal for the direct election of the Federal Council; while a third—to institute Proportional Representation—was twice rejected, but adopted on a third appeal (October 1918) by 299,550 votes to 149,035 and by 19½ cantons to 2½. In passing, it is proper to observe that the distinction between 'constitutional' and 'ordinary' amendments is, in practice, to a large extent illusory. Virtually any 50,000 citizens can by the use of the *Popular Initiative* obtain a vote of the Swiss people and of the cantons upon any proposal whatever, provided it is put in the form of a constitutional amendment, a provision which makes no excessive demands upon the ingenuity of a draftsman.<sup>1</sup>

On the whole, Swiss publicists are optimistic as regards the results of the *Referendum* and the *Initiative* in Switzerland. Legislative projects, carefully conceived and well thought out by the Federal Council and the Assembly are rarely rejected, except temporarily, by the votes of the people or the cantons, and so far from weakening the responsibility of the elected Legislators, the *Referendum*, in M. Bonjour's opinion, tends to increase it.

Projects of law are, he contends, drafted with greater

<sup>1</sup> *Uebersicht der eidgenössischen Volksabstimmungen seit 1848.*

care and precision and are expounded to the electors with greater intelligence and zeal. The device may, he admits, hinder the 'over-luxuriant growth of legislation', but it certainly stimulates the political education of the individual electors, and, taken in conjunction with the *Initiative*, it affords a real safeguard against revolution. A conclusion so decided emanating from a source so authoritative cannot be lightly set aside.<sup>1</sup>

M. Simon Deploige's judgement is more ambiguous. He admits that, for various reasons, the *Referendum* is comparatively harmless in Switzerland, but he is emphatic in his opinion that the last thing which is elicited by the device is a clear verdict on a particular issue.

'The result of a vote', he says, 'may be fortunate or unfortunate, but it has been determined as a matter of fact by a thousand different influences, and to speak of it as the expression of a thoughtful and conscientious popular judgement is only to juggle with words.'<sup>2</sup> M. Deploige's testimony is, it should be said, less recent and less authoritative than M. Bonjour's.

Whatever the verdict as regards Switzerland, we must still beware of hasty deductions from a single instance. The Swiss people have with manifest success worked out a certain political system for themselves, but it would, as Mr. Lowell observes, be dangerous to infer that 'similar methods would produce the same effects under different conditions. The problem they have had to solve is that of self-government among a small, stable, and frugal people, and this is far simpler than self-government in a great, rich, and ambitious nation.'<sup>3</sup>

The caution is very far from superfluous, whether it be addressed to Mr. Lowell's countrymen or to our own. Whatever may be said for or against the *Referendum* and the *Initiative*, this cannot be denied: that in Switzerland they are native products; they are devices which have

<sup>1</sup> *Op. cit.*, cc. v, vi, vii.

<sup>2</sup> *Op. cit.*, p. 293.

<sup>3</sup> A. Laurence Lowell, *Governments and Parties in Continental Europe*, ii. 335-6.

been engrafted on to the Federal Constitution after prolonged and varied experiments in the laboratories of the cantons; they are in complete harmony with the 'spirit of the Polity', and they are employed by a people who have had the advantage of a long apprenticeship in the art of self-government.

The Polity devised and elaborated for their own use by the Swiss people is, among the nations of the modern world, *sui generis*. Nowhere else, except possibly in Soviet Russia, is the type of modern democracy direct. Even in Switzerland the representative principle has been partially adopted, but the people as a whole are sufficiently habituated to the methods of direct democracy to be able to combine the two principles without inconvenience. But the Swiss type of democracy, though partially 'representative', is neither 'parliamentary' nor 'presidential'. Manifestly it is not 'parliamentary' in the English sense, since the Legislature would never dream of dismissing the Executive in consequence of the rejection of a Bill proposed to it by the ministers; still less would the ministers dream of resigning because their projects of law failed to find favour with the Legislature; least of all would the Legislature dissolve itself because its legislative schemes were rejected by the people or because the people anticipated its action by means of the *Initiative*. If Swiss democracy is not in the English sense parliamentary, neither is it, in the American, 'presidential'. The 'President' is not elected by the people nor has he any more influence upon the course of administration, nor upon policy, than any other member of the Federal Council. Among his colleagues in the Council he is temporarily *primus inter pares*, but like them he is the agent if not the servant of the Federal Council whose orders he and his colleagues carry out, in much the same way as the permanent officials of the English Civil Service carry out the orders of their political chiefs.

Non-presidential, non-parliamentary, Swiss democracy is, like American democracy, federal in texture; like

The Swiss  
Constitu-  
tion—  
unique



English democracy it is the outcome of a long process of historical evolution ; like no other democracy in the modern world it is in genius and in essence direct. Whether or not we can concede the claim that only in Switzerland is ' real ' democracy to be seen in operation, certain it is that the working of Swiss democracy is on many grounds of peculiar interest to the student of political institutions, and not least on this : that in the modern world it is unique.

## V. PRESIDENTIAL DEMOCRACY

### *The Evolution of the American Constitution*

'The basis of our political system is the right of the people to make and to alter their constitutions of government; but the Constitution which at any time exists, till changed by an explicit and authentic act of the whole people is sacredly obligatory upon all.'—WASHINGTON.

'Opposition to the Constitution, as a constitution, and even hostile criticism of its provisions ceased almost immediately upon its adoption; and not only ceased, but gave place to an indiscriminating and almost blind worship of its principles, and of that delicate dual system of sovereignty, and that complicated system of double administration which it established. . . . The divine right of kings never ran a more prosperous course than did this unquestioned prerogative of the Constitution to receive universal homage. . . . We are the first Americans . . . to entertain any serious doubts about the superiority of our own institutions.'—WOODROW WILSON (1884).

'The makers of our Constitution, wise and earnest students of history and of life, discerned the great truth that self-restraint is the supreme necessity and the supreme virtue of a democracy.'—ELIHU ROOR (1913).

'The constitutional history of the United States is as obviously as the constitutional history of England the record of an attempt to close political contests by means of treaties.'—A. V. DICEY, *Introd. to Boutmy, Études*, p. vii.

IN the history of Political Institutions and in the practical working of democratic machinery the Swiss Confederation occupies a place which is confessedly unique. The conditions which have secured for that peculiar experiment a large measure of success are not likely to be precisely reproduced in any part of the modern world. The place occupied in the history of political experiment by the United States of America is not less distinctive, and even more important.

The primary aim of Greek democracy was, as we have seen, the realization of the idea of equality. By the over-emphasis of that idea and by excessive zeal in pursuit of it Greek democracy destroyed itself. Liberty perished in the attempt to secure equality. Modern democracy,

Switzerland and the U.S.A.

Personal Liberty in U.S.A.

though far from neglectful of the root principles of equality, has rather concentrated its attention upon the attempt to devise institutions which, while securing public order, shall also preserve to the individual certain inalienable rights, and in particular the right of liberty. Government exists, so it is asserted in the Declaration of Independence, 'to secure these rights'. From the duty thus solemnly proclaimed and accepted at the outset of its national existence, the United States has never flinched. By its constitution, as will be seen, it has placed the preservation of personal rights beyond the reach of the caprices and vicissitudes of ordinary legislation. Neither the national Legislature nor the State Legislatures can with impunity infringe them. Nothing but the deliberate act of the sovereign people can curtail them.

Federal-  
ism

Not only in its respect for individual liberty was American democracy remarkable. The fathers of the American Constitution were the first to devise a new form of Polity. The idea of a League of States was not unfamiliar to the ancient or to the medieval world. The Old League of High Germany, out of which was evolved the Helvetic Confederation, affords one of many illustrations of such leagues. Whether the Swiss Confederation would develop into federalism of the true type was still, as we have seen, in the eighteenth century more than uncertain. Still more doubtful, as will be shown later, was the fate of the Dutch Confederation. The English in America may, therefore, claim the credit of having been the first to work out the details of a new type of Constitution. For the first time in history there was superimposed 'upon a federation of State Governments, a national Government with sovereignty acting directly not merely upon the States, but upon the citizens of each State'.<sup>1</sup> This is the distinctive quality of true federalism.

American  
democracy  
representative

American democracy is, then, primarily federal. Secondly, it is representative, a characteristic which

<sup>1</sup> Elihu Root, *Experiments in Government and the Essentials of the Constitution*, p. 27.

equally differentiates it from the democracies of Greece, Rome, and medieval Italy. The Constitution deliberately confides certain specified powers to an elected President and a representative Legislature. In adopting the representative principle it followed the English model, while exhibiting its originality in adapting to a federal Commonwealth a device as yet attempted only in a unitary State. The bicameral form of the federal legislature—a Senate and a House of Representatives—may also have been due in some measure to deference to English models, though the origin and composition of the Senate are, as I shall show, capable of another explanation. But the American Congress differs from the English Parliament in a very important respect: unlike its prototype it is not legally omnipotent. Federalism, as the fathers of the Constitution were quick to perceive, demands such limitations upon the power of the Legislature as a unitary State can perhaps afford to dispense with. Apart from this, Hamilton and his colleagues were deeply impressed by Montesquieu's doctrine of the separation of powers; but such a separation implies a definition of boundaries; definition involves rigidity, and both necessitate a custodian and interpreter of the Instrument in which the terms of the treaty, the conditions of the covenant, shall be enshrined. The American Constitution is essentially in the nature of a covenant between a number of independent commonwealths—an international treaty to the observance of which the several parties are solemnly bound.

Representative American democracy is: but it is not, in the modern English sense, parliamentary. Even the Legislature is not parliamentary, but, as Mr. Woodrow Wilson has insisted, 'congressional'; the Executive is not 'responsible' but presidential. The President is limited by the Constitution and responsible, ultimately, to the sovereign people; but he is in no sense, like an English Prime Minister, responsible to the Legislature.

But not  
parlia-  
mentary

To render these abstractions more intelligible it may

be well to forsake for a while the realm of political theory and explore briefly the historical origins of the American Constitution.

Genesis  
of the  
American  
Constitu-  
tion

On the threshold of the inquiry it is important to correct one or two misapprehensions which would seem to be widely prevalent among English critics. The authority of Mr. Gladstone gave currency to the belief that the whole federal constitution was due to a sort of miraculous conception on the part of a small group of American statesmen deliberating in the Convention of 1787. 'As the British Constitution', he wrote, 'is the most subtle organism which has proceeded from progressive history, so the American Constitution is the most wonderful work ever struck off by the brain and purpose of man.' For this view there is, it need not be said, some literal justification: yet the impression which the words convey is none the less misleading.

A second view suggests that this American Constitution 'is in reality a version of the British Constitution, as it must have presented itself to an observer in the second half of the last (i. e. the eighteenth) century. It is, in fact, the English Constitution carefully adapted to a body of Englishmen who had never had much to do with an hereditary king and an aristocracy of birth and who had determined to dispense with them altogether.'<sup>1</sup> How a political analyst so precise and scrupulous as Sir Henry Maine could have been responsible for suggestions so misleading it is difficult to comprehend. A third view, even less entitled to respect, though hardly more grotesquely inadequate, discovers the model of the American Constitution in that of the United Provinces of the Netherlands.

Essential-  
ly a native  
product

The actual form of the Constitution as it emerged from the Philadelphia Convention of 1787 was dictated by the immediate and insistent needs of the thirteen colonies as revealed by the bitter experience of the preceding ten years. It owed some of its more striking features to the

<sup>1</sup> *Popular Government.*

dominant influence of Montesquieu's political philosophy ; but, as a whole, it was essentially an organic product evolved from native sources, which, though originally English, had been considerably modified by their culture on American soil.

Of the thirteen original colonies some, like Virginia, were ' royal ', governed by companies located in England under grant from the Crown ; others, like Massachusetts, were founded under charters from the Crown, which, from the outset, virtually left them free to work out their own political salvation in their own way ; a third class included the ' proprietary ' colonies which, like Maryland, Pennsylvania, and Delaware, were granted by the Crown to individual proprietors. But whatever the original constitutional status all the colonies developed along parallel lines. The English Parliament claimed legislative jurisdiction, but as a fact the actual work of legislation was done in local assemblies which rapidly assumed the form and functions of provincial parliaments. The colonies, says Burke,

The  
Thirteen  
Colonies

' formed within themselves, either by royal instruction or royal charter assemblies so exceedingly resembling a parliament in all their forms, functions, and powers. . . . In the meantime neither party felt any inconvenience from this double legislature (i.e. the English and Colonial) to which they had been formed by imperceptible habits and old custom, the great support of all the governments in the world. Though these two legislatures were sometimes found perhaps performing the very same functions, they did not very grossly or systematically clash.'

In this dual jurisdiction it is not perhaps fanciful to perceive, if not the germ of federalism, at least a practical demonstration of the possibility of two concurrent systems of law and an apprenticeship in the difficult art of federal government. Be that as it may, the colonists were gaining invaluable experience in the task of self-government throughout the whole of the colonial period, a period which, in the case of Virginia, Massachusetts, and

some of the older colonies, extended over a century and a half.

The War  
of Seces-  
sion

In 1776 these communities exchanged the status of colonies for that of States, and under instructions from the Continental Congress of 1775 each colony recast its Constitution so far as was rendered necessary by the new and independent status it had assumed. Seven of the new States, including Virginia, Massachusetts, Maryland, and Pennsylvania, prefixed to their new Constitutions a Bill of Rights, which while recalling the familiar claims of English charters of liberties, appeal also, *more gallico*, to abstract principles of political philosophy. In the case of Rhode Island and Connecticut, which were already accustomed to choose their own governors and officials, as well as to make their own laws, hardly any modification of the 'charter' was found necessary.

The stern exigencies of war rendered imperative a further and very important step. Even for military purposes it was by no means easy to induce the several colonies to co-operate; much less to bring about an embryonic political union. Between the colonies there had hitherto been very little community of interest or sympathy. They differed in origin; in economic and physical conditions; in social structure; in religious sympathies; in political opinions. Yet differing between themselves each colony had its counterpart in some section of society, some ecclesiastical persuasion, some commercial interest, some political party at home. Maryland, for instance, was the home of the Roman Catholics and maintained close relations with fellow religionists at home; Virginia and the Carolinas with their large slave-worked plantations, their big country-houses, their devotion to the Crown and the Church of England, inherited the traditions of Cavalier England and reproduced many of the characteristics of English country life. New England, on the other hand, Puritan in origin, temper, and creed, and extorting a more grudging subsistence from a less genial soil, was in close sympathy and

communication with the middle classes at home. To bring together communities so diverse in origin and so divergent in outlook would have been impossible save under the pressure of military necessity. Yet the idea of union was not unfamiliar, and more than one attempt had been made to realize it. Several of the New England colonies had, as far back as 1643, united in a League of Friendship for the purpose of mutual protection against the Indian tribes which perpetually threatened their frontiers. The League lasted for forty years. William Penn drafted a scheme for colonial union and submitted it to the Board of Trade and Plantations in 1697. Franklin drew up a very detailed and elaborate plan in 1754, and not a few of his suggestions bore fruit in the Federal Constitution of 1787; but even in 1754 the time for union was not ripe, a truth which no one realized more clearly than Franklin himself. 'Their jealousy of each other', wrote Franklin as late as 1763, 'is so great that however necessary a union of the colonies has long been, for their common defence and security against their enemies, and how sensible soever each colony has been of that necessity, yet they have never been able to effect such a union among themselves nor even to agree in requesting the mother country to establish it for them.' But under the stress of war ideas are apt to mature rapidly. The Seven Years War against France and Spain, the war which deprived France of Canada and Louisiana, and Spain of Florida, did something. The quarrel with England in regard to commercial policy did more.

In September 1774 delegates from all the thirteen colonies except Georgia assembled in Congress at Philadelphia; so far had the policy of Grenville and North already gone to create, out of a group of heterogeneous colonies, a homogeneous people. Eight months later there met in the same city a Second Congress (May 1775), to which for the first time all thirteen colonies sent delegates. Blood had already been spilt at Lexington (April), but the Second Continental Congress, like the

The Philadelphia Congresses of 1774 and 1775



first, avowed the desire of the colonies for peace and their continued loyalty to the mother country. There is every reason to believe that the avowal was sincere : it may be inferred, firstly, from the fact that the Congress dispatched the ' Olive Branch Petition ' to England asking not for independence but merely for the recognition of the right of self-taxation ; and secondly from the fact—even more significant—that both the drafts for a permanent union—Galloway's as well as Franklin's—considered by the Congress assumed an ultimate reconciliation with Great Britain. But the sands were running out.

The issue was decided by the action of France. The Second Congress, while avowing its desire for peace, had appointed George Washington commander-in-chief of the confederate army ; but the first months of war made it clear that the colonies could not hope to cope successfully with the Imperial forces without outside assistance. France was willing and anxious to afford it ; but on terms : the colonies must first declare their independence. On 4 July 1776—one of the memorable dates in the history of mankind—the famous declaration was formally made that ' these United Colonies are and of Right ought to be Free and Independent States '. A new nation was born into the world.

The Declaration  
of Independence

The Articles of  
Confederation

But the new nation was as yet without a Constitution. The lack was to some extent supplied by the *Articles of Confederation* to which the Continental Congress agreed in 1777 and which were formally adopted by the States on 1 March 1781. The Confederation was little more than a league of friendship between sovereign and independent States. An emphatic assertion of the sovereignty of the States was put in the forefront of the instrument, though provision was made for an annual meeting of delegates from each State in Congress. Certain powers relating to foreign affairs, Indian affairs, peace and war, armaments, coinage, postage, &c., were expressly delegated to Congress, but its authority was severely and jealously restricted. Consequently the Confederation,

said Alexander Hamilton in 1780, was 'neither fit for war nor peace'. The fundamental defect of the new Constitution was, according to Jefferson, that Congress was not authorized to act immediately on the people and by its own officers. Their power was only requisitory, and these requisitions were addressed to the several Legislatures to be by them carried into execution without other coercion than the moral principle of duty. It is allowed, in fact, a negative to every Legislature and on every measure proposed by Congress; a negative so frequently exercised in practice as to benumb the action of the Federal Government, and to render it inefficient in its general objects, and more especially in pecuniary and foreign concerns.<sup>1</sup> Moreover, for lack of a 'federal' executive and judiciary, the Congress was compelled, to the profound disgust of the American disciples of Montesquieu, to exercise judicial and executive functions in addition to those of legislation.

Nevertheless, the *Articles of Confederation*, to say nothing of the Constitutions of the individual States, deserve more attention than they have, as a rule, hitherto received in this country. A detailed study of these documents would supply the best corrective to the notion that the Federal Constitution of 1787 sprang Minerva-like from the brain of Zeus. Many of the principles and institutions, subsequently elaborated in the Federal Constitution, are to be found in embryo in the earlier documents. Thus the New Hampshire Constitution (1776) contains the germ of the Federal Senate; the Virginian Constitution anticipates much of the language of the Federal Constitution, and some of its characteristic principle, notably the doctrine of the separation of the legislative, executive, and judicial powers; while the idea of conferring upon the President a suspensory veto on legislation was borrowed from the New York Constitution of 1777.

So long as the war lasted the Confederation from sheer necessity held together; yet how badly the machinery worked we may learn from the almost despairing appeals

State Con-  
stitutions

<sup>1</sup> Thomas Jefferson, *Works*, i. 78.

of Washington or from the more critical works of Hamilton. 'The States,' writes a modern critic, 'from memory of British oppression, were deeply concerned with a pedantic idea of liberty. . . . Their jealous refusal to delegate power or to part with any of their individual rights, even to a Congress elected by their own citizens, was the cause of more disasters to their arms and more embarrassment to their leaders than all the assaults of the enemy.'<sup>1</sup> The coming of peace served to accentuate the shortcomings of the embryonic Constitution. 'For the five years that preceded the adoption of the Federal Constitution,' wrote a great American statesman, 'the whole country was drifting surely and swiftly towards anarchy. The thirteen States, freed from foreign dominion, claimed and began to exercise each an independent sovereignty, levying duties against each other and in many ways interfering with each other's trade.'<sup>2</sup>

To induce these jealous and jarring republics to adopt any closer form of union was no easy task; it was accomplished, partly by the persistent effort and advocacy of a small group of enlightened statesmen, and still more by the hard pressure of circumstances. Chaos in finance, in commerce, in foreign relations, at last broke down the opposition of the most obdurate separatists. In the autumn of 1786 a Convocation met at Annapolis to discuss the commercial situation. Only five States were represented, but before they parted they agreed 'to use their endeavours to procure the concurrence of the other States in the appointment of Commissioners to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union'.

The Constitutional Convention at Philadelphia, 1787

The Constitutional Convention met at Philadelphia in May 1787 under the presidency of Washington, all the States except Rhode Island being represented. Sixty-two

<sup>1</sup> F. S. Oliver, *Life of Alexander Hamilton*, p. 48.

<sup>2</sup> Choate, *Alexander Hamilton*, p. 21.

delegates were appointed, but of these, seven never came to Philadelphia. Of the remaining fifty-five 'seven had served as Governors of their respective States, twenty-eight had been delegates to the Continental Congress, many had had actual experience in the legislative assemblies of the colonies or States'.<sup>1</sup> Hamilton, Madison, Franklin, and Randolph were the foremost men in the Convention. After four months of strenuous labour and several threats of disruption they completed a task which is perhaps the most memorable in the history of political institutions (17 September 1787). It was resolved that the Constitution, as drafted and accepted by the Convention, should as a whole be laid before the Congress of the United States; that it should afterwards be submitted for ratification to a convention of delegates specially chosen for the purpose in each individual State, and that it should come into effect so soon as it had been ratified by nine States.

The ninth ratification was not obtained until June 1788, and the interval of nine months was one of the most critical and momentous periods in the history of the United States. During this interval there appeared the essays on the new Constitution which are now collected into the famous volume *The Federalist*. Of the 85 essays contained therein, 51 at least were written by Alexander Hamilton, 14 by James Madison, 5 by John Jay, and 3 by Hamilton and Madison in conjunction. As a treatise on Political Theory the little volume certainly deserves the eulogies bestowed upon it, by the publicists of many countries, but its immediate purpose was severely practical: to induce the several States to ratify the Constitution drawn up by the Philadelphia Convention. That purpose was attained; but not without difficulty.

So much of historical preface has seemed essential, on the one hand, to dissipate certain misconceptions which still prevail in regard to the origins of the American Constitution; on the other to an intelligent apprehension of its outstanding characteristics.

<sup>1</sup> Kimball, *Government of the U.S.*, p. 2.

Many of the most characteristic features will demand attention in subsequent chapters, dealing with the articulation of the several organs of government. Only a general conspectus will be attempted here; no more indeed is necessary, for the whole field has been exhaustively surveyed not only by American writers like Story,<sup>1</sup> Fiske,<sup>2</sup> Hart,<sup>3</sup> Goodnow,<sup>4</sup> and Woodrow Wilson,<sup>5</sup> but by two of the most eminent publicists produced by France and England respectively, De Tocqueville<sup>6</sup> and Lord Bryce,<sup>7</sup> not to mention the slighter studies of Sir Henry Maine<sup>8</sup> and Emile Boutmy.<sup>9</sup>

General  
features of  
the American  
Constitution  
Federal  
and State  
Governments

Before proceeding to examine the provisions of the Federal Constitution there are some more general observations which it seems important to emphasize.

The first is that the Federal Constitution was superimposed upon the existing State Constitutions, and is intelligible only if it is regarded as complementary to them. This is a point which is apt to be ignored by those who are familiar only with unitary Constitutions such as those of Great Britain and France. English and French commentators on American institutions are, therefore, wise to insist upon it. The Federal Government, as Lord Bryce points out, does not profess to be a complete scheme of government.

It presupposes the State governments; it assumed their existence, their wide and constant activity. It is a scheme designed to provide for the discharge of such and so many functions of government as the States do not already possess

<sup>1</sup> *Commentaries on the Constitution* (1833).

<sup>2</sup> *Civil Government in the United States* (1890), and *Critical Period of American History* (1898).

<sup>3</sup> *Federal Government* (1891) and other works.

<sup>4</sup> *Comparative Administrative Law* (1903).

<sup>5</sup> *Congressional Government* (1885) and *The State* (1899).

<sup>6</sup> *Democracy in America* (1834-40).

<sup>7</sup> *The American Commonwealth* (1st edition 1888).

<sup>8</sup> *Popular Government* (1885).

<sup>9</sup> *Studies in Constitutional Law* (1888). To the above I should add Dr. Everett Kimball's *The National Government of the United States* (1920), which came under my notice only after much of this chapter was written; but I have been fortunately able to avail myself in revision of Dr. Kimball's valuable and recent survey.

and discharge. It is therefore, so to speak, the complement and crown of the State constitutions, which must be read along with it and into it in order to make it cover the whole field of civil government, as do the constitutions of such countries as France, Belgium, Italy.' <sup>1</sup>

Similarly M. Boutmy insists that the Federal Constitution is unintelligible when taken alone. 'It is like a body, of which you see nothing but the head, feet, and hands, in fact all the parts that are useful in social life, while the trunk containing the vital organs is hidden from view. This essential part, which is hidden, represents the Constitutions of the separate States.' <sup>2</sup> Jefferson, with pardonable exaggeration, went so far as to say that 'the Federal Government is only one department of foreign affairs'.

Since Jefferson's day centripetal tendencies in the United States as elsewhere, have rapidly gained at the expense of centrifugal forces, and consequently the balance between the Federal and the State Governments has greatly altered. To this shifting in the balance of the Constitution the first powerful impulse came from the civil war, and the successful assertion, in that war, of unionist principles. To the war are attributable the Thirteenth (18 December 1865), the Fourteenth (28 July 1868), and the Fifteenth (30 March 1870) amendments of the Constitution. The Eighteenth and latest amendment (29 January 1919) claims for the National Government the right to regulate, or rather to prohibit the manufacture and sale of intoxicating liquor, a matter previously left to the discretion of the States. But notwithstanding this manifest tendency, the warnings uttered by Lord Bryce and M. Boutmy are, even now, far from superfluous, and the student of the Federal Constitution will do well to remember that, in relation to the whole government of the United States, it is in itself but a fragment.

The Constitution itself bears in almost every article the marks of its origin: at every turn it reveals the

<sup>1</sup> *The American Commonwealth*, i. 29.

<sup>2</sup> *Op. cit.*, p. 69.

The  
balance  
shifting

jealous fears of the constituent republics, lest any form of national government should curtail their independence and limit their powers. Two 'plans' were, as a fact, submitted to the Philadelphia Convention: the *Virginia Plan*, by Randolph; the *New Jersey Plan*, by Patterson. The former was frankly unitarian and would in effect have substituted for the existing republics a strong national government. The *New Jersey Plan* on the contrary was designed for the protection of the smaller States, and contemplated not a union of the people but a league of independent Commonwealths. The resulting Constitution was a compromise between these two diametrically opposed ideals. The House of Representatives went some way to satisfy Virginia; New Jersey secured a safeguard in the Senate.

The Con-  
stitution  
a Treaty

Yet when all is said, the essential safeguard for the rights alike of the States and of the people is to be found in the Constitution itself. The significance of this basic truth is apt to be missed by Englishmen; but unless and until it be apprehended there can be no understanding of the fundamental principle of American government. The American Constitution was the product of no ordinary legislative body, but of a constituent assembly convened for the sole and specific purpose of drafting what was in effect an inter-state if not an international treaty. Moreover, the terms of that treaty were to have no validity until they had been ratified by at least two-thirds of the parties thereto. Once more, for the purpose of ratification, the ordinary State Legislatures were not permitted to suffice; the treaty was submitted in each State to constituent convention, which, like the National Convention itself, were specially summoned for this exclusive end. No precaution was, therefore, omitted which could either appease jealousy, dispel suspicion, or emphasize the all-important truth that the authority to make, as to amend, the Constitution was vested in no delegates, Congress, or Convention, but exclusively in the sovereign people of the United States.

Nevertheless, the precautions, though ample and precise, were not deemed sufficient. It was and is a fundamental doctrine of the American Constitution that the National Government possesses only such powers as are delegated to it by the States or conferred upon it by the people. By Article I, section 8, of the Constitution certain powers are, by enumeration, conferred upon Congress; by section 9 certain other things are prohibited; section 10 lays certain limitations upon the States. But the jealous fears of the people were not completely allayed, and during the process of ratification no fewer than six States proposed amendments dealing with the delegation of powers. The result of the agitation is seen in the ten amendments which were embodied in the Instrument by 1791. Of these, two are, in this connexion, especially noteworthy:

Article IX. The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Article X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

No loophole for possible conflict or confusion was to be left: plainly, unmistakably, the *residuum* of powers was to be vested, not in Congress nor in any branch of the National Government, but in the States and the sovereign people. The principle enunciated with so much emphasis is indeed vital to true federalism. Sovereignty rests with those in whom is vested residual authority. It may, as in Switzerland, or Australia, or America, be the States, or it may, as in Canada, be the Federal Legislature—or ultimately the Imperial Legislature: where it is, there is sovereignty.

The sphere of federal activity was clearly demarcated from that of the State. The National Government was to concern itself mainly with political affairs, with foreign relations, national defence, and so forth; while social and



domestic questions, the relations of citizen and citizen, were for the most part reserved to the States. The Instrument itself was indeed intended not to embody a code of laws, but rather to create a political system; and the great bulk of its articles are taken up, therefore, with a description of political institutions, Executive, Legislative, and Judicial.<sup>1</sup> But within its own appropriate sphere, alike of legislation and administration, the Federal Government is supreme. This is a point so difficult of apprehension by peoples whose minds are imbued (as are those of most Englishmen) with the Austinian doctrine of sovereignty, that it may be prudent to enforce it by citation from an American jurist of European repute :

' A dual sovereignty ', writes Dr. Choate, ' was successfully established, by means of which the Federal Government within its sphere is supreme and absolute in all federal matters, and for those purposes able to reach by its own arm without aid or interference from the States every man, every dollar, and every foot of soil within the wide domains of the Republic, leaving each State still supreme, still vested with complete and perfect dominion over all matters domestic within its boundaries. Harmony between the two independent sovereignties is absolutely secured by the judicial power vested in the United States Supreme Court, to keep each within its proper orbit by declaring void, in cases properly brought before it, all State Laws which invade the federal jurisdiction, and all Acts of Congress which trespass upon the Constitutional rights of the States.' <sup>2</sup>

Separation of Powers

If the Constitution was careful to assign to their appropriate spheres the functions of the central and local government respectively, it was not less concerned as to the rigid separation of powers between the Executive, the Legislature, and the Judiciary. In no Constitution in the world, not even in those of revolutionary France, has more superstitious regard been paid to the famous formula of Montesquieu.

<sup>1</sup> For this interesting point and elaboration of it cf. F. J. Stimson, *The American Constitution*, pp. 14 seq., and Kimball, *op. cit.*, pp. 50 seq.

<sup>2</sup> Choate, *Alexander Hamilton*, pp. 36-7.

From all this it might naturally be inferred that the American Constitution, with its precise demarcation of spheres and its scrupulous separation of powers, is exceptionally 'rigid' in character. In theory indubitably it is. Yet written though it is and rigid as are its terms, it has proved itself in practice far more flexible than its authors, or some of them, intended and anticipated. In nothing have Americans proved more conclusively their English descent than in their superiority to their own handiwork; in their refusal to be confined within the four corners of their Instrument. 'Rigidity', as will be seen later, is a necessary ingredient in federalism; a document which partakes of the nature of an international agreement cannot be treated so cavalierly as a merely municipal law; and the process of constitutional revision is in the United States exceptionally elaborate. The formal amendments to the Constitution have consequently been singularly few, only eighteen in all; and of these no fewer than ten were enacted before November 1791, almost, indeed, before the original Constitution had actually come into operation. The eleventh and twelfth date from 1798 and 1804 respectively; the last one hundred and sixteen years have yielded only eight. The changes which, in the course of a century and a quarter, the American Constitution has undergone have been more subtle in character and more gradual in effect. 'There has been', wrote Dr. Woodrow Wilson in 1884, 'a constant growth of legislative and administrative practice, and a steady accretion of precedent in the management of federal affairs, which have broadened the sphere and altered the functions of the Government without perceptibly affecting the vocabulary of our constitutional language.' Then follow from the same authoritative pen some remarkable words: 'Ours is, scarcely less than the British, a living and fecund system. It does not indeed find its rootage so widely in the soil of unwritten law; its tap-root at least is the Constitution; but the Constitution is now, like Magna Carta and the Bill of Rights, only the

Rigidity of the Constitution: has it been exaggerated?

sap centre of a system of government vastly larger than the stock from which it has branched.' <sup>1</sup> Not dissimilar is the comment of Dr. A. B. Hart :

'The Constitution of 1789 has undergone great changes, most of them in the direction of greater centralization. . . . The elasticity and flexibility of the Constitution have not only preserved the federation, but have introduced a new principle into federal government. . . . The permanence of the United States is not due to the constructive skill of its founders; it rests upon the fact that the Constitution may, by the insensible effect of public opinion, slowly be expanded, within the forms of law, to a settlement or new questions as they arise.' <sup>2</sup>

Does Dr. Hart do justice to the wisdom and prescience of the Fathers of the Constitution? Is it not rather clear from the tenuity of the document that they deliberately abstained from detail and contented themselves with the enactment of a cadre which posterity might endow with flesh and blood? Thus a discriminating English critic writes of the Constitution: 'At the most it was only a licence to begin governing granted to a few energetic characters who had faith in their own capacity to make the experiment succeed.' <sup>3</sup>

Illustrations of flexibility

Illustrations of the subtle changes effected by time and precedent will not be lacking in the pages that follow, but attention may, in passing, be called to the change in the method of electing the President; to the transformation of the Senate from a 'diet of plenipotentiaries' into the most powerful Second Chamber in the world; to the gradual but uninterrupted growth in power of the Central Government and the weakening of those restraints which it was imagined the States would impose upon it; to the influence exerted by 'that puissant doctrine of the "implied powers" of the Constitution' which, as Mr. Wilson has justly observed, has been 'the chief dynamic

<sup>1</sup> *Congressional Government*, p. 7.

<sup>2</sup> *Federal Government*, pp. 59, 60.

<sup>3</sup> F. S. Oliver, *op. cit.*, p. 185.

principle'<sup>1</sup> in American constitutional development; above all, to the profound effect produced upon every branch of the administration by the higher and higher perfection to which party organization has been brought. It is not indeed devoid of significance that just as the Parliamentary Government of England quickly proved itself to be unworkable without the organized discipline of political parties; so the Presidential system of America showed itself equally dependent upon the same artificial and apparently adventitious accompaniment.

An adequate appreciation of the influence of the Party System upon politics and society in America would demand not a paragraph but a volume. Lord Bryce devotes to the subject no fewer than twenty-three chapters of his *American Commonwealth*, and to that intimate and elaborate study the reader may be referred.<sup>2</sup> The whole question is, however, much less unintelligible to an English reader than it was half a century ago, or even when Lord Bryce first published the *American Commonwealth*. Party organization is indeed a natural and inevitable accompaniment of the development of democracy. The selection of candidates for seats in the central and local legislatures is as much a matter of moment as their election, and to confer the electoral franchise upon the mass of the people and at the same time to deny to them any freedom of choice in the selection of candidates is both illogical and irritating. The caucus is the legitimate complement of a popular franchise, and the caucus means elaborate party organization. If such an organization made its appearance sooner in America than in England, and if it has been carried farther, the phenomenon must be ascribed to a more acute appreciation of the logical development of the machinery of the democratic State.

We may now pass in succinct review the chief organs The Executive

<sup>1</sup> *Congressional Government*, p. 22.

<sup>2</sup> It is also treated in Chapters V and VI of Kimball's *National Government of the United States*, and with characteristic elaboration in Ostrogorsky's *Democracy and the Organization of Political Parties*.

of the National Government, reserving critical comment, for the most part, to subsequent chapters.

The Constitution (Article II, section 1 (1)) provides that 'The Executive power shall be vested in a President of the United States of America. He shall hold office for the term of four years.'

The Constitution also provided with great precision for the method of election, both of the President and of the Vice-President. This method was, however, altered by the 12th amendment to the Constitution (1804). I will therefore describe not the original but existing machinery. The election is indirect; it is made by an electoral college, the members of which are chosen by the people in each of the several States. The precise mode of election in the States is left to the discretion of each State. Originally, and for some time, many States entrusted the selection of Presidential electors to their Legislatures, and in South Carolina this method was continued until 1868. Gradually, however, the States adopted the method of direct popular election—a plan which was from the first adopted by Virginia, Maryland, and Pennsylvania. There is nothing, however, in the Constitution to prevent a reversion to the earlier method, or the invention of an entirely new one. But whatever the method of selection each State may prefer to adopt, it is entitled under the Constitution to as many electors as it has Senators and Representatives in Congress. These electors are chosen on the Tuesday following the first Monday in November in the year which immediately precedes the expiration of a Presidential term. On the second Monday of the ensuing January they assemble in the several State capitals to cast their votes for the President. The votes are counted in the Houses of Congress sitting in joint session on the second Wednesday of the following February. The electors may not be members of Congress nor holders of any federal office. The inauguration of the President thus elected takes place on 4 March.

The formal qualifications for the Presidential office are

few. The President must be a natural-born citizen of not less than thirty-five years of age and have been for fourteen years a resident within the United States. He receives a salary of 75,000<sup>1</sup> dollars, and it is provided by the Constitution that the salary shall be neither diminished nor increased during his term of office. Should the President die during his term his place is taken by the Vice-President, elected at the same time, and in the same manner as the President himself. In the event of the death or disability of both President and Vice-President, the office is to be filled *ad interim* by various members of the Cabinet, according to a settled order, but such members must possess Presidential qualifications.

The formal functions of the President, according to the Constitution, are as follows:

(1) The command in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States;

(2) To grant reprieves and pardons for offences against the United States except in cases of impeachment;

(3) To make treaties, but only with the assent of two-thirds of the Senate;

(4) To nominate all ambassadors, other public ministers, and consuls, judges of the Supreme Court, and other federal officers; but these appointments are subject to the concurrence of a two-thirds majority of the Senate.

Congress is, however, permitted to vest in the heads of departments, or in the Courts of Law, or in the President alone, the right of appointing to inferior offices, and this power has been largely exercised to relieve the President of a vast amount of inferior patronage.<sup>2</sup>

With this brief reference to the Executive we may pass to the federal Legislature. In discussing its position and functions English readers, in particular, will do well to remind themselves that Congress, unlike their own

The Legis-  
lature

<sup>1</sup> Also \$25,000 as a travelling allowance.

<sup>2</sup> For a further discussion of the position of the American President and the 'Cabinet', cf. *infra*, c. xxvi.

Parliament, is not omnipotent, but is, on the contrary, severely restricted by the Constitution: its functions, in fine, are not constituent but legislative.

In structure it is, like the English Parliament, bicameral, consisting of a Senate and a House of Representatives.

The  
Senate

Of all the political institutions of the United States the Senate is in some senses the most distinctive and is certainly not the least interesting. According to the original design of the Constitution the Senate was to represent the constituent States of the Union and to be elected by the State Legislatures. Article I, Section iii (1), ran as follows: 'The Senate of the United States shall be composed of two Senators for each State, chosen by the legislature thereof, for six years; and each Senator shall have one vote.' In 1912, however, a very important amendment was passed by which, as will be seen, direct was substituted for indirect election. The new article runs as follows:

'The Senate of the United States shall be composed of two Senators from each State, *elected by the people thereof* for six years; and each Senator shall have one vote. *The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.* It is further provided that one-third of the Senate shall retire every two years, and that no one shall be elected to it who (a) is under thirty years of age; (b) has not been a resident of the United States for nine years; and (c) is not resident in the State for which he is elected.'

In these Constitutional provisions two points at once arrest attention. The first is that the federal Second Chamber is neither hereditary nor nominated but elected. Hereditary it could not under the circumstances have been; but it is significant that the method of election was preferred to that of nomination which has since been adopted in Canada. A second point is the continuous existence of the Senate. The membership of the Senate is renewed from time to time, but its members neither come in nor go out all together. One-third of the Senate

retires every two years ; but two-thirds of its members are always old, and thus stability and continuity are secured. Senators change, the Senate is permanent.

The purpose which the Senate was intended to serve in the general scheme of the Constitution is thus clearly stated in the *Federalist* : <sup>1</sup>

‘ Through the medium of the State legislatures, which are select bodies of men, and who are to appoint the members of the National Senate, there is reason to expect that this branch will generally be composed with peculiar care and judgement ; that these circumstances promise greater knowledge and more comprehensive information in the national annals ; and that on account of the extent of country from which will be drawn those to whose direction they will be committed they will be less apt to be tainted by the spirit of faction and more out of the reach of those occasional ill-humours or temporary prejudices and propensities which in smaller societies frequently contaminate the public deliberations, beget injustice and oppression towards a part of the community, and engender schemes which, though they gratify a momentary inclination or desire, terminate in general distress, dissatisfaction, and disgust.’

It is noticeable, however, that the mode of choosing the Senate which was ultimately adopted was not that which had commended itself to Hamilton and others, and which they had originally proposed. Hamilton would seem to have preferred indirect election by an electoral college elected on a high property qualification—on the same principle, in fact, as the election of President. His plan suggested that ‘ each Senator should be elected for a district, and that the number of Senators should be apportioned among the several states according to a rule roughly representing population ’.

Whether this plan would have worked equally well is far from certain ; still less certain is it that it would have provided a permanent solution of the difficulties which confronted the framers of the Constitution. On every ground, therefore, it is fortunate that it was not adopted.

<sup>1</sup> No. 27.



Genesis of  
the Senate

What was the source of the scheme which was finally adopted? To this question many divergent answers have been given. Some point to the English House of Lords as the original. But apart from their common bicameral form the American Congress and the English Parliament have little in common. Others find in the composition of the Senate the final and conclusive proof of the theory which traces the American Constitution to a Dutch original. And with this degree of plausibility: the States-General of the Netherlands, like the American Senate, was representative not of the people but of the States, and each State found in it, without regard to size or population, equal representation. Mr. Fisher scornfully repudiates both theories. According to him the Senate, like other American institutions, is derived from the scientific cultivation of a purely native germ. That germ is to be found in 'the Governor's Council of colonial times'. This institution was

'at first a mere advisory council of the Governor, afterwards a part of the legislature sitting with the assembly, then a second house of legislature sitting apart from the assembly as an upper house; sometimes appointed by the Governor, sometimes elected by the people, until it gradually became an elective body, with the idea that its members represented certain districts of land, usually the counties. It had developed thus far when the National Constitution was framed, and it was adopted in that instrument so as to equalize the states, and prevent the large ones from oppressing the smaller ones. This was accomplished by giving each state two Senators, so that large and small were alike. The language in the Constitution describing the functions of the Senate was framed principally by John Dickinson, who at that time represented Delaware—one of the smaller states—which had suffered in colonial times from too much control by Pennsylvania.'<sup>1</sup>

Be this as it may, it is indisputably the case that the Senate has from the first represented the centrifugal principle in American federalism. It stands for the inde-

<sup>1</sup> *Evolution of the American Constitution.*

pendence of the States. Bearing this in mind, it is not remarkable that of all the fundamental principles of the American Constitution the most rigid and unalterable should be that of equality of State representation in the Federal Senate. 'No state', so runs the Constitution, 'can be deprived of its equal suffrage in the Senate without its own consent'—a consent which would, of course, under no circumstances be given.

Consisting originally of twenty-six members, the Senate now consists of ninety-six. The English Upper House consists of more than 700 members; the French Senate of 314, the Canadian of 87, the Australian of 36, the South African of 40. Relatively to the size and population of the Union, the American Senate is therefore the smallest Second Chamber in the world—a fact which may in some degree account for the efficiency with which it performs the functions entrusted to it by the Constitution.

Those functions are threefold: Legislative, Judicial, Functions and Executive.

Its legislative authority is, except in regard to finance, co-ordinate with that of the House of Representatives, and is exercised with a freedom to which many Second Chambers are strangers. Any Bill (except a Bill to raise revenue) may originate in either House, and owing to the fact that in America the Executive does not, as in England, dominate the Legislature, the Senate takes its fair share in initiating legislation. Finance Bills must, however, originate in the House of Representatives, though the Senate enjoys and exercises the same powers of amendment and rejection in regard to these, as in regard to other Bills. In the event of a disagreement between the two Houses a conference committee, composed of members of both Houses, is appointed by the President of the Senate and the Speaker of the House. The report of this committee is generally accepted by both Houses. Not until the Bill is passed in identical form by the two Houses is it sent up for the approval of the President, who has the right to 'return it, unsigned' to Congress. Should the Bill again

pass by a two-thirds vote in both Houses, the President's veto lapses and it becomes law with or without his assent.

If, as sometimes happens, a Bill passes one House and the other House declines to deal with it during that session, it may start again in the following session where it left off, provided that it is in the same Congress. Should a new Congress have been elected in the interval the Bill must start on its legislative career afresh.<sup>1</sup>

Impeach-  
ment

The part taken by the Senate in legislation is by no means its most characteristic or distinctive work. The fathers of the Constitution intended that the Senate, like the English House of Lords, should perform important judicial functions; and, unlike the House of Lords, should also have a share in the Executive. By Article I, § 2, of the Constitution the sole power of impeachment is vested in the House of Representatives; by § 3 the sole power to try impeachments is vested in the Senate. When sitting for that purpose Senators are to be on oath or affirmation. When the President of the United States is on trial, the Chief Justice is required to preside in place of the ordinary presiding officer of the Senate, who being also Vice-President of the Republic is naturally supposed to have a direct interest in the conviction and consequent removal of the President. In the trial of other officers the Vice-President presides as usual. The judicial powers of the Senate are, from the nature of the case, infrequently exercised. One President of the United States, President Johnson, was impeached in 1868, and was acquitted. Impeachment is the only means by which a federal judge can be got rid of, and in certain instances it has proved to be a clumsy and even a brutal weapon. Four federal judges have been impeached, of whom two were convicted. In one case the device was resorted to as the only means of getting rid of a judge who had become insane.

In addition to these cases, a Secretary of War and a senator have also been impeached. But few as have been the cases in which recourse has been had to this

<sup>1</sup> A. L. Dawes, *How we are Governed*.

particular method of proceeding provided by the Constitution, it could not, as Lord Bryce says, 'be dispensed with, and it is better that the Senate should try cases in which a political element is usually present, than that the impartiality of the Supreme Court should be exposed to the criticism it would have to bear did political questions come before it. Most senators are or have been lawyers of eminence, so that as far as legal knowledge goes they are competent members of a court.'<sup>1</sup>

Of all the attributes of the American Senate the most distinctive, however, is the fact that it shares with the President two important executive functions: (i) the right of 'confirming' the appointment of all persons nominated by the President to act as ambassadors and judges of the Supreme Court and other federal judges, officers, or ministers;<sup>2</sup> and (ii) the right to concur in the making of treaties. In each case two-thirds of the senators present must concur. Patronage

How has the joint executive authority of Senate and President worked in practice?

As regards the appointment of Cabinet ministers, it has become customary for the Senate to approve, as a matter of course, the nomination of the President, to whom such ministers are solely responsible. In the appointment of ambassadors, consuls, judges, heads of departments, and the chief military and naval officers, the concurrence of the Senate is less of a mere form. In regard to other federal officers there has been gradually established what is known as the 'Courtesy of the Senate', by which the nomination to a federal office in any particular State is left by common consent to the senators representing that State. This arrangement is obviously advantageous to the party wire-pullers, but it is one against which many of the stronger Presidents have from time to time chafed and protested bitterly, though without effect.

In the appointment of minor officials the Senate, as we have seen, takes no part.

<sup>1</sup> *Op. cit.* i. 107.

<sup>2</sup> Constitution, Art. II, § ii.

Even so, the participation of a branch of the Legislature in the exercise of patronage has been generally condemned, alike by native and by foreign critics. Of the former, Mr. Woodrow Wilson may be accepted as typical ; and his opinion is expressed in no uncertain terms :

' The unfortunate, the demoralizing influences which have been allowed to determine executive appointments since President Jackson's time have affected appointments made subject to the Senate's confirmation hardly less than those made without its co-operation ; senatorial scrutiny has not proved effectual for securing the proper constitution of the public service.' <sup>1</sup>

Lord Bryce represents the more cautious and balanced opinion of foreign critics :

' It may be doubted whether this executive function of the Senate is now a valuable part of the Constitution. It was designed to prevent the President from making himself a tyrant by filling the great offices with his accomplices or tools. That danger has passed away, if it ever existed ; and Congress has other means of muzzling an ambitious chief magistrate. The more fully responsibility for appointments can be concentrated upon him, and the fewer the secret influences to which he is exposed, the better will his appointments be.' <sup>2</sup>

In this temperate judgement most English students of American institutions will be ready to concur. In the discharge of its executive functions the Senate sits, debates, and votes *in camera* ; and with all deference to Lord Bryce, who regards public discussion as ' the plan most conformable to a democratic government ', it seems doubtful whether his alternative would not be preferable. It is true that secret sessions may tend to obscure the responsibility both of the President and of the Senate ; that they may lead to a large amount of log-rolling, and not infrequently to positive corruption. Nevertheless, public discussion of the claims of rival candidates for the highest executive and judicial offices of the State would

<sup>1</sup> *The State*, p. 544.

<sup>2</sup> *Op. cit.* i. 106.

not encourage the best men to allow themselves to be nominated, or secure for the successful candidate the support and respect of the nation as a whole. Publicity and secrecy alike have disadvantages ; but in view of the fact that the responsibility for nomination rests with the President, and that the function of the Senate is limited to ' concurrence ', I cannot doubt that the Senate has chosen the lesser of two evils in maintaining the confidential character of its Executive sessions.

A similar method of procedure obtains in regard to the confirmation or rejection of treaties with foreign States. The advantages and disadvantages resulting from the interposition of the Senate in this delicate function have been hotly canvassed. It is plainly repugnant to English views of propriety that diplomatic engagements should be submitted before completion to the rough and tumble of debate in either branch of the Legislature. But in defence of the rule which prevails in America, there are several points to be urged. In the first place, the Senate was in its inception less a branch of the Legislature than an appendage to the Executive. Or rather it was both. It corresponded at least as closely to the English Privy Council as to the House of Lords. Consisting of only twenty-six members, it was intended by the fathers of the Constitution to act as ' a council, qualified by its moderate size and the experience of its members, to advise and check the President in the exercise of his powers of appointing to office, and concluding treaties '.<sup>1</sup> The Constitution says that the President ' shall have power, by and with the advice and consent of the Senate to make treaties '. . . . The question has arisen whether the ' making ' of a treaty includes the negotiation of it or applies only to the ratification. This question, with others cognate to it, have been learnedly and exhaustively argued in a recent monograph by Dr. Edward Corwin, whose conclusion may be summarized in Jefferson's dogmatic aphorism : ' the transaction of business

Treaty-  
making

<sup>1</sup> *Federalist*.

with foreign nations is executive altogether.' 'The net result', adds Dr. Corwin, 'of a century and a quarter of contest for power and influence in determining the international destinies of the country remains decisively and conspicuously in favour of the President.'<sup>1</sup> The practice has not, however, been uniform. Some Presidents have consulted the Senate both before and during the actual process of negotiations, though it is tolerably certain that there rests upon them no legal obligation to do so. Such formal consultation is rare, but informal consultation with individual members of the Senate has been so common as almost to become an established rule.<sup>2</sup> Until very recent days the President has been accustomed to keep himself closely and continuously in touch with the Senatorial Committee for Foreign Policy. The Chairman of the latter body is in effect a sort of 'Parliamentary Second Secretary of State for Foreign Affairs'. Nevertheless, the following paragraph seems now to re-echo a vanished past :

'European statesmen may ask what becomes under such a system of the boldness and promptitude so often needed to effect a successful coup in Foreign Policy. . . . The answer is that America is not Europe. The problems which the Foreign Office of the United States has to deal with are far fewer and usually far simpler than those of the old world. The Republic keeps consistently to her own side of the Atlantic; nor is it the least of the merits of the system of senatorial control that it has tended, by discouraging the Executive from schemes which may prove resultless, to diminish the taste for foreign enterprises, and to save the country from being entangled with alliances, protectorates, responsibilities of all sorts, beyond its own frontiers.'<sup>3</sup>

The dispute with Great Britain in regard to the Venezuela boundaries (1895) proved to be the starting-point of a new departure in American diplomacy. Then came the war with Spain (1898) which was followed by the assumption of definite responsibilities in the Caribbean

<sup>1</sup> *The President's Control of Foreign Relations* (1917), p. 207.

<sup>2</sup> Kimball, *op. cit.*, p. 549.

<sup>3</sup> Bryce, *op. cit.* i. 103.

Archipelago and in the Pacific. The annexation of the Hawaiian Islands (1898), the partition of Samoa (1899), the conquest of the Philippines and the participation in the suppression of the Boxer rebellion in China announced the advent of a new world-power. American intervention in the Great War appeared to confirm the announcement ; but the Senate has declined to accept the logical results of that intervention. How the attitude of the Senate will react upon the balance of constitutional forces in the United States it is premature to attempt to judge.

It remains to notice a third reason for the participation of the Senate in the functions of the Executive. So long as the Americans cling to the theory of the rigid separation of powers, some such relaxation in practice is inevitable. The preponderating power of the Executive in England is possible only because the Executive is strictly responsible to the Parliamentary majority, and because ministers are conscious that any flagrant misuse of power, whether in domestic or in foreign affairs, would be followed by instant dismissal at the hands of the Legislature. No such power resides in the Legislature of the United States. Should the President or his ministers be guilty of a legal offence, resort may be had to impeachment. But impeachment, as the Long Parliament discovered to its chagrin in the case of Strafford, is at best a clumsy weapon with which to attack a powerful minister. For the correction of errors, as apart from crime, it is wholly inappropriate. If, therefore, the Executive is, for a fixed term, virtually immovable, the immensely important task of concluding treaties with foreign States cannot, it would seem, be left to the unchecked and unlimited discretion of the President. If his responsibility is to be shared, there is no body with whom it can be shared with less inconvenience and impropriety than with the Senate.

That the Senate is no longer, owing to the inclusion of new States, the select body of councillors contemplated by the founders of the Commonwealth is true ; but the difficulties arising from its inevitable and automatic



enlargement have been, in great measure, obviated by the delegation of work to a series of standing committees : a committee on Finance to which all questions affecting the revenue are referred ; a committee on Appropriations which advises the Senate concerning all votes for the spending of moneys ; a committee on Foreign Affairs, on Railways, and so forth. This committee organization, according to Mr. Wilson, ' may be said to be of the essence of the legislative action of the Senate ', and has immense influence upon its action in all capacities.<sup>1</sup> Only indeed through these committees, and especially through the chairmen of committees, can the Senate keep that touch with the Executive which, denied by the theory of the Constitution, is nevertheless in practice essential to its successful working.

How far, it may be asked, has the federal Second Chamber of the United States answered the expectations and fulfilled the intentions of the framers of the Constitution ? The Senate, as we have seen, was intended to be primarily the embodiment of the federal principle in the Constitution. It was hoped that it would ' conciliate the spirit of independence in the several states by giving each, however small, equal representation with every other, however large, in one branch of the national government.' <sup>2</sup> In the early days of the Commonwealth this was a point of vast importance ; the union was ill-compacted and incoherent, and the part played by the Senate in cementing it was in no sense nominal or meagre. With the growth of time and the evolution of an American national spirit, this particular function has naturally become of less importance, but it is by no means obsolete or superfluous. As compared with the House of Representatives which represents the people, the Senate represents primarily the States.

But apart from this, its elementary function, the Senate performs that of an ordinary Second Chamber. It restrains ' the impetuosity and fickleness of the popular

<sup>1</sup> *The State*, p. 529.

<sup>2</sup> *Federalist*.

House, and so guards against the effect of gusts of passion or sudden changes of opinion in the people'. It does, moreover, in an eminent degree, fulfil the intention of its founders by providing 'a body of men whose greater experience, longer term of membership, and comparative independence of popular election' makes them 'an element of stability in the government of the nation, enabling it to maintain its character in the eyes of foreign States, and to preserve a continuity of policy at home and abroad'.<sup>1</sup> How admirably the Senate has attained, in this respect, its object is admitted by all who are competent to express an opinion.

The Senate is unquestionably a stronger Second Chamber than the English House of Lords. Not only has it larger powers and more extended functions, but it exercises those powers with greater freedom and independence, and in the main with more general assent.

Nor is the reason far to seek. Of the men who go into politics in America the Senate attracts 'the best.

'If', says Mr. Wilson, 'these best men are not good, it is because our system of government fails to attract better men by its prizes, not because the country affords or could afford no finer material. . . . The Senate is in fact, of course, nothing more than a part, though a considerable part, of the public service; and if the general conditions of that service be such as to starve statesmen and foster demagogues, the Senate itself will be full of the latter kind, simply because there are no others available. . . . No stream can be purer than its sources. The Senate can have in it no better men than the best men of the House of Representatives; and if the House of Representatives attracts to itself only inferior talent, the Senate must put up with the same sort. Thus the Senate, though it may not be as good as could be wished, is as good as it can be under the circumstances. It contains the most perfect product of our politics, whatever that product may be.'<sup>2</sup>

More important than the House of Lords as regards its legal functions, the Senate is not inferior to it in popular 'intelligibility'. The House of Lords is of course con-

<sup>1</sup> *Ibid.*

<sup>2</sup> Wilson, *Congressional Government*, pp. 194-5.

spicuously fortunate in this respect. Its position rests on a principle which if no longer generally accepted is at least clearly intelligible. But the American Senate is at no disadvantage here. It also, as I have shown, is the result of a natural and native evolution, and it rests on a principle which is not less intelligible than hereditary succession. Further, it is a principle which differentiates it from the House of Representatives just as clearly as the principle of birth differentiates the hereditary House of Lords from the elected House of Commons. And to secure an intelligible differentia for a Second Chamber is, as publicists are never weary of insisting, not less important than difficult. That difficulty has been a great stumbling-block in France, and hardly less so in the younger democracies of the British Empire.

The American Senate, moreover, is superior to the House of Lords in its efficiency as a revising chamber, and in the respect and confidence which it inspires. The latter advantage is due perhaps to the elective basis on which it rests, the former attribute is inseparably bound up with its restricted size. Hence the consensus of opinion among all reformers of the English House of Lords that the first and essential step is to reduce its overgrown and unwieldy bulk to something like the dimensions of the Second Chamber if not of America, at least of France. To a discussion of this question I propose to return. From the Senate we now pass to the House of Representatives.

The House  
of Repre-  
sentatives

The House of Representatives may be dismissed more briefly than the Senate, for although it presents points of interest as regards the development of procedure it is less distinctive than the Second Chamber as regards competence and composition. As the Senate represents the federal principle in the Constitution, so the 'House' represents the nation. Yet even the House bears unmistakable marks of its origin; it is still 'congressional' rather than parliamentary; it, no less than the Senate, is based upon a recognition of the fact that the

States are politically self-contained and in large measure autonomous.

The Constitution ordains (Article I, section 2 (1)) that the House shall be 'composed of members chosen every second year by the people of the several *states*, and the electors in each state shall have the qualifications required for electors of the most numerous branch of the *State Legislature*'; that Representatives shall be apportioned by Congress among the several States according to population on the basis of a decennial census; that the aggregate number shall not exceed one for every thirty thousand but that each *State* shall have at least one Representative. My italics will sufficiently emphasize the insistence upon the State as the basis of representation. But other indications of the same principle are not lacking. It is the State which determines not only the electoral franchise (subject to the general directions of the Instrument) but also the method of voting, and (where they exist) the electoral districts. Consequently States may either elect the whole body of representatives assigned to them by one general ticket, or in equal electoral districts, or partly by one method and partly by the other; they may also decide whether the franchise shall be extended to or withheld from women, but the Fifteenth Amendment (1870) forbids the denial or abridgement of the right to vote 'on account of race, colour, or previous condition of servitude'.<sup>1</sup> This provision the Southern States have found means to evade by imposing educational tests or requiring property qualifications. Again, it is to the Governor of his State that a Representative tenders his resignation, and it is the Governor, not the Speaker of the House, who issues a writ for the filling of the vacancy.

The present House consists of 435 members, or one (on the basis of the census for 1910) for every 211,877 of the population. Every member must be (i) at least

<sup>1</sup> An amendment (the 19th) forbidding discrimination on account of sex was adopted in 1920. (This corrects figures on pp. 115 and 119 *supra*.)

twenty-five years of age; (ii) a citizen of the United States of seven years' standing; (iii) an inhabitant, when elected, of the State for which he is chosen. To the constitutional qualification of habitancy of the State custom adds that of residence in the particular district, a custom which forbids a defeated candidate, however eminent, to seek a new constituency.<sup>1</sup> Representatives, as well as Senators, receive a salary of \$7,500 a year, with an addition of \$1,500 for 'clerk hire', 'mileage', and free postage.

**Powers** The functions of the House are not distinctive. It has the sole right to initiate impeachments and money-bills and co-ordinate rights in ordinary legislation. If the President vetoes a Bill passed by both Houses it must be referred back, and on reconsideration must obtain a two-thirds majority in each House. If the President takes no action on a Bill within ten days it becomes law without his assent. The right of impeachment has been exercised only nine times, and only three times has the Senate convicted. One President (Johnson) and one Justice of the Supreme Court were among the acquittals. Another function somewhat anomalous belongs to the House. If in the presidential election no candidate gains a majority the House must immediately by ballot elect a President from among the three highest on the list; the States voting as units, and a majority of States being essential to election. Apart from this, from impeachments and taxation, the functions of the House are merely legislative, and need not detain us.

**Procedure** Of its procedure the most distinctive feature is the organization of Committees. It is in these Committees, of which there are about sixty in the House, and an even larger number in the Senate, that the work of legislation is done, while the Chairman of the Committees, especially of the Foreign Relations, the Ways and Means, and the Appropriations Committees, may almost be regarded as a sort of supplementary Executive. Down to 1911 the

<sup>1</sup> Kimball, *op. cit.*, p. 276.

Committees and their Chairmen were appointed by the Speaker ; they are now appointed by the House, which means in effect by the legislative caucus. This caucus, or party organization, is all-powerful, and indeed indispensable. Without it the procedure of the House would be, as to outside observers it might well appear to be, simply chaotic. The proceedings on the floor of the House are little more than formal ; there are few if any full dress debates ; there are no ministers to be interpellated ; no matters of executive policy to be discussed ; no divisions critical to the existence of an administration to be taken. Legislation is the task of committees and committees are the creatures of the caucus. By the party caucus the committees are in fact nominated, and to the caucus the committees look for the endorsement of their legislative decisions.

The Speaker is in form elected by the House, in fact he is the nominee of his party, and he remains after election to the Chair a party leader. The Speaker

‘ His position is, nevertheless, one of great dignity ; in the official hierarchy he stands next to the President himself, and his powers, though somewhat diminished since 1911, are immense. His tenure, however, is brief, being limited to the two years’ duration of the House, unless his party secures re-election. In that case, but not otherwise, his tenure may be prolonged. Like his English prototype he presides over debates, maintains order, decides disputed points, arranges the business of the House, and determines, within limits, the order of speaking by “ recognizing ” the members who desire to address the House. Until recently he exercised the still more important function of nominating the members of all committees and appointing their chairman. This function has now, it has been said, been transferred to the House itself, and with the consequential result that the Speaker’s undivided and unquestioned leadership is now shared to some extent with the Chairman of the Committee on Ways and Means and the Chairman of the Committee on Rates. These functionaries like himself are party nominees and party leaders and with him may be said to constitute a triumvirate leadership

of the House. The Chairman of the former committee now generally acts as the "Floor-leader" of his party, and is virtually, therefore, leader of the House, while the minority have in their own floor-leader a leader of the "opposition". The "opposition" however is purely legislative; it does not provide or represent an "alternative government".

It would be natural to suppose that in the absence of a government and of an opposition there would be almost complete equality among members all of whom are 'private' and 'back-benchers'. That it is not so is due to two reasons: first, to the strictness of party organization, the supremacy of the caucus; and, secondly, to the brevity of tenure. No Congress can last more than two sessions: a long session of some six months (normally from December to May or June); and a short session from December to March; but of late years, as in England, sessions have tended to be almost continuous. Even so a new member has little chance of finding his feet before the time comes for dissolution and problematical re-election. His position in Congress depends, even more than in the case of an English member, on his position in his party. If he stands well with the caucus he is assured of assignment to important committees; if for any reason he does not, he might as well spare himself the trouble of a journey to Washington.

With these facts before him English critics are apt to underrate the power of Congress and the position of Congressmen. The President is constantly before their eyes; the better informed appreciate the personality of the Secretaries, and the high prestige which attaches to membership of the Supreme Court. Weight is allowed even by foreigners to the utterances of the Presidents and Ex-Presidents of the greater Universities: but who cares what is said by a Representative or even by a Senator? They have been taught by Bagehot that Congress is little more than 'a debating society adhering to an Executive'. A more intimate knowledge of the working of American institutions might have led Bagehot,

even in the sixties, to modify the terms of his stricture. In view of the share in executive authority assigned by the Constitution to the Senate the generalization was too sweeping even in that day ; in view of the rapid development of the committee system, alike in the Senate and in the House, it would be still less accurate to-day. Bagehot's views of the American Constitution were largely influenced by the fact that members of the Executive were excluded from the Legislature and by the consequent absence of that 'correspondence' which he rightly regards as essentially characteristic of our own Constitution.

English critics ought not, however, to forget that the American Constitution was drafted at a moment when the jealousy of 'placemen' was still an active force in English politics, when the English Crown still sought to influence the Legislature by the exercise of patronage, and when Montesquieu's doctrine of the separation of powers was still profoundly influential among the publicists of Western Europe. Under these circumstances it is not remarkable that the Americans, like successive constitution-makers in France, should have attempted to render the Legislature independent by excluding the members of the Executive. But by so doing they deprived Members of Congress, as Lord Bryce points out, 'of some of the means which European legislators enjoy of learning how to administer, of learning even how to legislate in administrative topics. They condemned them to be "architects without science, critics without experience, and censors without responsibility"'.<sup>1</sup> Moreover, as the same critic insists, the attempt to keep Legislature and Executive rigidly distinct has had a result not foreseen by the makers of the Constitution. It has led the 'Legislature to interfere with ordinary administration more directly and frequently than European Legislatures are wont to do. It interferes by legislation, because it is debarred from interfering by interpellation'.<sup>2</sup>

<sup>1</sup> *Ibid.* i. 224.

<sup>2</sup> *Ibid.* i. 86.



Finally, it must be remembered that the Federal Legislature of the United States is, in another important respect, on an altogether lower plane than our own Imperial Parliament: it is merely legislative and not constituent; it can make laws, but only within the four corners of the Constitution; the Constitution itself it cannot touch. Upon the power of the British Legislature there is, of course, no such limitation. It is hardly open to question that the restricted area of legislative activity, combined with the fact that the service in the Legislature does not, as in England, open an avenue to a place in the Executive, must in the long run affect the supply of really first-rate political talent.

Notwithstanding these limitations Mr. Wilson could write of Congress, in 1884, as the 'central and predominant power' of the federal system of the United States and could describe American government as genuinely 'congressional'.

'The predominant and controlling force,' he wrote, 'the centre and source of all motive and of all regulative power, is Congress. All niceties of constitutional restriction and even many broad principles of constitutional limitation have been overridden, and a thoroughly organized system of congressional control set up which gives a very rude negative to some theories of balance and some schemes for distributed powers, but which suits well with convenience, and does violence to none of the principles of self-government contained in the Constitution.'<sup>1</sup>

By 1900 Mr. Wilson had, however, noted some shifting in the balance of the Constitution, notably 'the greatly increased power and opportunity for constructive statesmanship given the President, by the plunge into international politics'.<sup>2</sup> Should a new edition of his classical work be called for in the near future we may anticipate still further modification of the views it originally set forth. On one point, however, there will and can be no change. The Federal Legislature, whether its power

<sup>1</sup> *Op. cit.*, p. 11.

<sup>2</sup> *Op. cit.*, p. xi.

waxes or wanes, will in the future, as in the past, exercise its functions in strict subordination to the Constitution. Of that Constitution the guardianship is vested in the Judicature ; but with this, the most interesting and the most distinctive of all the political institutions of the United States, it is proposed to deal in some detail in a later chapter.

Taken by itself the Federal Constitution is, as we have already insisted, a mere *torso*. Its provisions are intelligible only if it be remembered that they refer exclusively to powers specifically delegated to the National Government by the Sovereign Republics. The whole residue of authority still resides in the States. Of all the ' balances ' reckoned as essential to the normal operation of the American Constitution none, says Mr. Wilson, is

The State  
Constitu-  
tions

' so quintessential as that between the national and the state governments ; it is the pivotal quality of the system . . . the object of this balance is . . . to check and trim national policy on national questions, to turn Congress back from paths of dangerous encroachment on middle or doubtful grounds of jurisdiction, to keep sharp, when it was like to become dim, the line of demarcation between state and federal privilege, to readjust the weights of jurisdiction whenever either state or federal scale threatened to kick the beam.'<sup>1</sup>

The checks which State sovereignty was deemed likely to impose upon the Federal Government have proved less effectual than was intended and expected. In America, as to a lesser degree in Switzerland, the dominant tendency has been centripetal. The tide of governmental activity has set steadily and with increasing force towards Washington : so much so that Judge Cooley's verdict has won general assent :

' The effectual checks upon the encroachments of federal upon state power must be looked for, not in state power of resistance, but in the choice of representatives, senators and presidents holding just constitutional views, and in a federal supreme court with competent power to restrain all departments and all officers within the limits of their just authority,

<sup>1</sup> *Op. cit.*, pp. 13-14.

so far as their acts may become the subject of judicial cognizance.' <sup>1</sup>

In this perpetual readjustment of the balance between the Federal and the State Governments we have one of the many and multiplying instances of the practical flexibility of the American Constitution. An equipoise so delicate it is not easy for a foreign critic to appreciate or to expound with precision. Some words must, however, be added in order to describe, in bare outline, the mechanism of the State Governments.

These Governments vary very considerably in details, but in essentials they are generally uniform.

All the States possess a written Constitution which, like the Federal Constitution, is superior to ordinary statutes, and which usually includes, in addition to a Frame of Government and to various miscellaneous provisions, a Bill of Rights. These Constitutions invariably provide for a separation of powers—legislative, executive, and judicial—with even greater preciseness than the Federal Constitution. In every respect they are indeed far more detailed than the Federal Instrument and, owing to the consistent tendency to incorporate ordinary statutes in the Constitutions, the latter are becoming more and more unwieldy in bulk.

The Legis-  
latures

The State Legislatures are in no case sovereign law-making bodies, and the laws which emanate from them occupy, as we have seen, the fourth and lowest place in degrees of validity, being inferior not only to the articles of the several Constitutions, but to the Federal Constitution and federal laws.

The structure of the State Legislatures is bicameral: Senators being generally elected for four, and representatives for two years, but there is no such *differentia* in the States as that which distinguishes the two houses of the Federal Congress. Like the latter the State Legislatures do the bulk of their work in standing committees.

The State  
Governor

The State Governor who is directly elected by the

<sup>1</sup> *Principles of Constitutional Law*, pp. 143-4.

people exercises a considerable influence upon legislation by means of his 'message' and by the exercise of a veto : but in administration his power is much more circumscribed than that of the President. The executive officials are not appointed by the Governor but directly elected by the people, and are responsible neither to the Governor nor to the Legislature. Between these officials and the boards over which they preside there is entire lack of connexion or co-ordination, with results disastrous to efficient administration.

Alike in the election of officials and of legislators the party organizations are supreme, and it is to them that the politicians who are elected owe primary if not exclusive allegiance. Some States have adopted the ultra-democratic principle of the Recall of Officials, applying it not merely to the Legislature and the Executive but even to the Judiciary.

Each State has a complete judicial hierarchy, entirely distinct from the Federal Courts, but the details of judicial organization vary greatly in different States. Equally varied is the mode of appointing judges. In some States they are appointed by the Governor, in others they are elected by the Legislature or directly by the people. The tenure of judges is in some cases 'during good behaviour', in others it is as short as two years. In few cases is it sufficiently secure ; in some, as already said, it is purely arbitrary. In some States the decisions of the judges in regard to the validity of statutes are subject to 'Popular Review', a particular law declared invalid by the Supreme Court of the State being validated by a popular vote.

Such in briefest outline is the government of the States : brevity must not, however, blind us to the fact that, despite the centripetal tendency already noticed, the American States, like the Swiss Cantons, exert the most powerful influence upon the daily life of the citizens. 'The Federal Government', said De Tocqueville, 'is the exception ; the government of the states is the rule.'

Three-quarters of a century later Mr. Woodrow Wilson could not only re-echo De Tocqueville's language, but could reiterate, with even greater emphasis, his deliberate judgement: 'Even more than the cantons our states have retained their right to rule their citizens in all ordinary matters without federal interference. They are the chief creators of law among us. . . . They make up the mass, the body, the constituent tissue, the organic stuff of the government of the country.'<sup>1</sup>

From a judgement so decided and so authoritative there can be, at any rate for a foreigner, no appeal. Moreover, it sets the final seal upon the genuinely federal character of American democracy. The seeds of personal liberty and of self-government the English colonists in America brought with them from the land they left; but the soil upon which they fell was not English soil; the culture bestowed upon them was not English culture; it was profoundly modified by the new environment, and by the conditions under which the young and tender shoots struggled to maturity. To drop metaphor: the type of democracy which the American people have evolved for themselves is not the English type; it is not unitary, but federal, not flexible but exceptionally rigid, not parliamentary but presidential. It boots not to ask which of the two types is the better: the essential point is that each is original, each is native, and each has afforded a model for imitation. What Pericles affirmed of Athens is true both of England and of America. The modern Englishman and the modern American may say with the ancient Greek: 'We have a form of government not derived from imitation of our neighbours. We are rather a pattern to others than they to us.' For the modern world the choice would seem to lie in outline between the American type of democracy—federal, rigid, presidential—and the English—unitary, flexible, and above all parliamentary. To an analysis of the characteristic features of Parliamentary Democracy we now proceed.

<sup>1</sup> *The State*, p. 470.

BOOK III

PARLIAMENTARY DEMOCRACY



## VI. PARLIAMENTARY DEMOCRACY

### *The Government of England*

' En Angleterre la Constitution peut changer sans cesse ; ou plutôt elle n'existe pas.'—DE TOCQUEVILLE.

Great critics have taught us one essential rule. . . . It is this, that if ever we should find ourselves disposed not to admire those writers or artists, Livy and Virgil for instance, Raphael or Michael Angelo, whom all the learned had admired, not to follow our own fancies, but to study them until we know how and what we ought to admire ; and if we cannot arrive at this combination of admiration with knowledge, rather to believe that we are dull, than that the rest of the world has been imposed on. It is as good a rule, at least, with regard to this admired constitution [of England]. We ought to understand it according to our measure ; and to venerate where we are not able presently to comprehend.'—EDMUND BURKE.

' Le gouvernement d'Angleterre est plus sage parce qu'il y a un corps qui l'examine continuellement, et qui s'examine continuellement lui-même : et telles sont ses erreurs, qu'elles ne sont jamais longues, et que par l'esprit d'attention qu'elles donnent à la nation elles sont souvent utiles.'—MONTESQUIEU, *Grandeur et Décadence des Romains*.

' An infinitely complex amalgam of institutions and principles, the British Constitution is naturally devoid of all comprehensive system ; yet to the inquirer who brings with him historical sense and political insight this mass of seeming inconsistencies is perfectly intelligible. To no other, however, will it yield its secret.'—DR. JOSEF REDLICH.

' There is no civil government that hath been known . . . more divinely and harmoniously tuned and more equally balanced as it were by the hand and scale of justice than is the Commonwealth of England, where under a free and untutored monarch, the noblest, worthiest and most prudent men, with full approbation and suffrage of the people, have in their power the supreme and final determination of highest affairs.'—MILTON, *Of Reformation in England*.

TO pass from a study of the Constitutions of the United States and Switzerland to that of England is to bid good-bye to waters where every detail of navigation is accurately known and noted and to embark upon an uncharted sea. Foreign critics are, as is natural, peculiarly sensible of the difficulties inherent in a study of

General characteristics of the English Constitution



English political institutions. One of the most brilliant of French commentators compares it picturesquely to a 'un chemin qui marche, or, "to a river whose moving surface glides away at one's feet, meandering in and out in endless curves, now seeming to disappear in a whirlpool, now almost lost to sight in the verdure."'<sup>1</sup> De Tocqueville went even farther and in a famous aphorism declared that 'in England there is no Constitution'. It is indeed true that unlike the French, the Swiss, the Americans, and in fact most of the other nations of the world we do not possess any 'single document, conceived all at once, promulgated on a given day, and embodying all the rights of government and all the guarantees of liberty in a series of connected chapters'.<sup>2</sup>

Yet the contrast suggested in these citations must not be pressed too far. The English Constitution is, as will presently be seen, exceptionally flexible, and it is unwritten, in the sense that it is not embodied in an Instrument. Other Constitutions in the modern world are mostly written and at least technically more or less rigid; but Mr. Woodrow Wilson has warned us that even the American Constitution is less rigid than is commonly supposed; that there has been 'a constant growth of legislative and administrative practice, and a steady accretion of precedent in the management of federal affairs, which have broadened the sphere and altered the functions of the government without perceptibly affecting the vocabulary of our constitutional language. Ours is scarcely less than the British a living and fecund system.'<sup>3</sup> On the other hand, Mr. Lowell, commenting upon the Government of England, has pointed out that the distinction between written and unwritten, between rigid and flexible Constitutions, has tended, of late years, to lose a good deal of the practical importance formerly attached to it.<sup>4</sup> We have already noted the tendency which has

<sup>1</sup> M. Émile Boutmy, *Studies in Constitutional Law*, p. 4. Cf. the same writer's *English Constitution* (Eng. trans.).

<sup>2</sup> *Ibid.*, p. 5.

<sup>3</sup> *Congressional Government*, p. 7.

<sup>4</sup> *The Government of England*, i, pp. 4-6.

manifested itself in Switzerland and in some of the American States to blur the distinction between constituent and law-making powers, between fundamental laws and ordinary statutes. Consequently the difference between the Constitution of England and that of other countries tends to become one of degree rather than of kind. It is, however, noteworthy that the tendency results from the approximation of other Constitutions to our own, not from the contrary process. A correct apprehension of the outstanding characteristics of the English Constitution is, therefore, alike for ourselves and for others, exceptionally important.

No modern Constitution can be adequately apprehended from a study of the text of the Instrument. Nevertheless it is difficult to exaggerate the convenience afforded, particularly to foreign commentators, by the existence of such an Instrument. The critic of English Institutions has no such *Vade mecum*. There are Statutes and Documents which must from their special significance be more particularly studied in connexion with the development of the English Constitution. Conspicuous among them are: *Magna Carta* (1215); Edward the First's Summons to Parliament (1295); the *Apology* of 1604; the *Petition of Right* (1628); the *Agreement of the People* (1649), and the two written Constitutions of the Protectorate; the *Bill of Rights* (1689) and the *Act of Settlement* (1701); the Acts of Union with Scotland (1707) and Ireland (1800); the Reform Acts of 1832, 1867, 1884, 1885, and 1918, and the *Parliament Act* (1911). No one, however, can pretend that a study of these and similar documents would afford to the student a conspectus of the English Constitution similar or comparable to that derived from the text of a written Constitution such as that of America, of Switzerland, of Belgium, of Italy, or even of British Dominions like Canada, Australia, or South Africa. Nor is the reason far to seek. None of the great documents illustrative of the growth of the English Constitution goes much, if at all, beyond the immediate

Largely  
'unwritten'

necessities of the hour. Not one of them (except Cromwell's almost still-born Constitutions) approaches, even remotely, a constitutional code or Instrument. Our political instincts have been essentially objective. A specific grievance has manifested itself and a specific remedy has been applied. Provided the momentary ache or pain has yielded to treatment, administrative or legislative, scant regard has been paid to the remoter effects of the remedy prescribed. Moreover, the essential point at issue, or that which to later commentators appears to be essential, would seem not infrequently to have eluded contemporary statesmen.

Constitutional jurists tell us, for example, that the cardinal point of dispute between the Stuart sovereigns and their parliaments was the question of the responsibility of Ministers—the relations of the Executive to the Legislature. We search in vain through the Petition of Right or the Bill of Rights for any allusion to this capital topic. So true is it that English political liberties have not come 'by observation'.

To this rule there have been exceptions. The written Constitutions of the Commonwealth and Protectorate belong to a revolutionary period, and they did not endure. They may be regarded, therefore, as exceptions that prove the rule. The constitutional Instruments which define the governmental form of the great Oversea Dominions—though in form merely enactments of the Imperial Legislature—belong to another category and may possibly foreshadow a new constitutional departure. Of these it will be necessary to say something later on. For the moment it must suffice to indicate the exceptions and to call attention to the peculiar genius which underlies the history of our constitutional evolution. The violent have often attempted to take the constitutional kingdom by storm, but the method has never yet proved itself to be permanently successful; the genius of silent growth has invariably reasserted itself.

This peculiarity of English constitutional development has naturally attracted the attention, in the main flattering and appreciative, of foreign commentators. Thus M. Émile Boutmy writes :

' The English have left the different parts of their Constitution just where the wave of History had deposited them ; they have not attempted to bring them together, to classify or complete them, or to make a consistent and coherent whole. This scattered Constitution gives no hold to sifters of texts and seekers after difficulties. It need not fear critics anxious to point out an omission, or theorists ready to denounce an antinomy. . . . By this means only can you preserve the happy incoherences, the useful incongruities, the protecting contradictions which have such good reason for existing in institutions, viz. that they exist in the nature of things, and which, while they allow free play to all social forces, never allow any one of these forces room to work out of its allotted line, or to shake the foundations and walls of the whole fabric. This is the result which the English flatter themselves they have arrived at by the extraordinary dispersion of their constitutional texts, and they have always taken good care not to compromise the result in any way by attempting to form a code.' <sup>1</sup>

In striking contrast to the English method are, on the one hand, the complete Instruments of Federal States like America and Switzerland, and on the other, the organic statutes in which unitary States, like France, deem it advisable to embody the fundamentals of their Constitution.

It is proper, therefore, and important, again to reaffirm the elementary truth that the English Constitution, though resting in part upon the foundations of Acts of Parliament and other documents, nevertheless belongs essentially, fundamentally, and emphatically to the category of *unwritten* Constitutions.

Not less essentially is it a flexible Constitution. There exists in England no distinction between fundamental Its flexibility or constitutional laws and ordinary laws, between the

<sup>1</sup> *Studies in Constitutional Law*, p. 7.

constituent function and the legislative function, between the revision of the Constitution and the enactment of ordinary statutes. The peculiar, perhaps unique flexibility of the English Constitution may be ascribed, in particular, to two causes: on the one hand to the fact that it is an organic growth, the result of a prolonged process of evolution; on the other to the acceptance of the doctrine of the omnipotence of Parliament.

Its Con-  
tinuity

The first demands only passing notice; it has long since become the commonplace of commentators. Thus Freeman, in a well-known essay, insisted upon the continuity of constitutional development in England, perhaps with unnecessary emphasis but with unquestionable accuracy:

'The continued national life of the people, notwithstanding foreign conquests and internal revolutions, has remained unbroken for fourteen hundred years. At no moment has the tie between the present and the past been wholly rent asunder; at no moment have Englishmen sat down to put together a wholly new Constitution, in obedience to some dazzling theory. Each step in our growth has been the natural consequence of some earlier step; each change in our Law and Constitution has been, not the bringing in of anything wholly new, but the development and improvement of something that was already old. Our progress has in some ages been faster, in others slower; at some moments we have seemed to stand still, or even to go back; but the great march of political development has never wholly stopped; it has never been permanently checked since the days when the coming of the Teutonic conquerors first began to change Britain into England.'<sup>1</sup>

Even our Revolutions have been proverbially conservative, and the primary anxiety of reformers has been to show that proposed innovations were in reality nothing but reversions to an earlier type. Nor, as a rule, has it been difficult to do so. 'By far the greatest portion of the written or statute laws of England consist', as Palgrave points out, 'of the declaration, the re-assertion, repetition,

<sup>1</sup> *English Constitution*, p. 19.

or the re-enactment, of some older law or laws, either customary or written, with additions or modifications. The new building has been raised upon the old ground-work: the institutions of one age have always been modelled and formed from those of the preceding, and their lineal descent has never been interrupted or disturbed.'

The point is one which demands no elaborate illustration. Nor is the explanation far to seek. National character has something to say to it; geographical situation has even more, and the peculiar genius of the Constitution has most of all. A good deal of scorn—only partially deserved—is sometimes poured upon 'national character' as the last resort of bankrupt criticism. But the thing exists, and must unquestionably be counted among the factors that have gone to the moulding of the English Constitution, and particularly to the preservation of its continuity.

'The best instances of Flexible Constitutions', as Lord Bryce has pointed out, 'have been those which grew up and lived on in nations of a conservative temper, nations which respected antiquity, which valued precedents, which liked to go on doing a thing in the way their fathers had done it before them. This type of national character is what enables the Flexible Constitution to develop; this supports and cherishes it. The very fact that the legal right to make extensive changes has long existed, and has not been abused, disposes an assembly to be cautious and moderate in the use of that right.'<sup>1</sup>

To this cause, then, we must in the first place ascribe the peculiar degree of flexibility inherent in the English Constitution.

Not less important in this connexion was the affirmation and acceptance of the doctrine of Parliamentary Sovereignty, the legislative omnipotence of the King in Parliament. The classical passage on this subject is in Blackstone's *Commentaries*:

The doctrine of Parliamentary Sovereignty

<sup>1</sup> *Studies in History and Jurisprudence*, i. 166-7.

'The power and jurisdiction of Parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. And of this high court, he adds, it may be fairly said, "Si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima." It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms.'<sup>1</sup>

Professor Dicey's illuminating study on the *Law of the Constitution* is in large part an extended commentary on the same text. The Sovereignty of Parliament is, he declares, from a legal point of view, the dominant characteristic of our political institutions, and he resolves the doctrine into three proportions:

1. There is no law which Parliament—the King in Parliament—cannot make.

2. There is no law which Parliament cannot repeal or modify; and

3. 'There is under the English Constitution no marked or clear distinction between laws which are not fundamental or constitutional, or laws which are.'

There is, first, no law which Parliament cannot make. By the Act of Settlement, for example, it even determined the succession to the throne. In 1707 it effected by ordinary legislative enactment a legislative union with Scotland and in 1800, by similar action, a legislative union with Ireland. Those Acts fundamentally altered the Constitution of the two Houses of the Legislature, and indeed the whole Constitution of the United Kingdom. By the same authority and by similar process they could of course be repealed. The Act of 1800 was in fact, though not in terms, repealed by an Act passed in 1922 to

<sup>1</sup> Bk. I, chap. ii, § 3, p. 160 (ed. 1844).

implement the Treaty of 1921.<sup>1</sup> But perhaps the crowning illustration of the omnipotence of Parliament is to be found in the Septennial Act of 1716. That Act not merely extended the duration of *future* Parliaments from three years to seven, but actually prolonged the existence of the sitting Parliament for that term. Constitutional purists, like Priestley, were aghast at this violation of the 'rights' of the people; and with much show of reason. For, by the same token, future Parliaments might prolong their own existence from seven years to seventy, or, like the Parliament of 1641, make it perpetual. Hallam derides Priestley's 'ignorant assumption'. But Priestley was right. If a Parliament elected under the Triennial Act could legally prolong its existence from three years to seven, there was nothing to prevent another Parliament, elected under a Septennial Act, from extending its term to seven hundred years.

In 1911, by the *Parliament Act* Parliament limited its own duration to five years; but the Parliament which ought to have expired in 1915 at latest was not actually dissolved until December 1918. By successive enactments, renewed at intervals every six months, Parliament prolonged its existence for three years beyond its legal term.

The significant point is, however, that there is in fact nothing in the English Constitution to prevent such usurpations on the part of Parliament; nothing, that is to say, of a legal nature. Cromwell put a stop to a similar usurpation in April 1653, when he shut the doors upon the Long Parliament and ordered the removal of the 'bauble' of authority—the mace. But Cromwell did this, be it observed, not by an appeal to law, nor by an appeal to the constituencies—the ultimate depositories of political sovereignty—but by an appeal to force. *Inter arma silent leges*; in the rattle of musketry you cannot hear the voice of the law. Cromwell's Ironsides were more than a match for the legal sophistries of the attenuated

<sup>1</sup> 12 and 13 George V, c. 4.



rump of the Long Parliament. None the less, Professor Dicey is justified in his appeal to the Septennial Act as the sufficient and conclusive proof of the doctrine of Parliamentary Sovereignty. 'That Act', as he says, 'proves to demonstration that in a legal point of view Parliament is neither the agent of the electors nor in any sense a trustee of its constituents. It is legally the Sovereign power of the State, and the Septennial Act is at once the result and the standing proof of such Parliamentary Sovereignty.'

Secondly, there is no law which Parliament cannot repeal or modify or temporarily set aside. At the time of the Disestablishment of the Irish Church in 1869 there was much discussion as to the competence of Parliament virtually to repeal one of the clauses of the Act of Union. Such an argument might have been perfectly valid as a political or even a moral ground of objection to Mr. Gladstone's proposal; but it had no legal validity whatsoever: nor had the similar objection that the Ministry were, by the passing of this Act, virtually compelling the Queen to a violation of her coronation oath. From the point of view of the constitutional lawyer the Act of Union had no superior validity to the Act authorizing the construction of the Manchester and Liverpool railway. Even more significant in this connexion are the enactments which, like Acts of Indemnity, are 'as it were the legalization of illegality'. For more than a hundred years (1727-1828) Parliament regularly passed an annual Act of Indemnity to relieve Dissenters from the penalties to which they exposed themselves for having, in violation of the Test Act, 'accepted municipal offices without duly qualifying themselves by taking the Sacrament according to the rites of the Church of England'; and in the year 1920 there was passed a very comprehensive Act to indemnify the agents of the Executive who, during the continuance of the Great War, had authorized proceedings which, if not legalized retrospectively, would have involved penalties to them-

selves and large expenditure to the country. The strenuous opposition offered to the enactment of this statute,<sup>1</sup> and the large modifications it underwent in its passage through Parliament, afford testimony alike to the jealousy felt by English citizens at any infringement, even in war-time, of personal rights, and to the omnipotence of Parliament.

Students of history will not, however, need to be reminded that there was a period when the legal sovereignty of Parliament was seriously menaced. Nor is it without significance that this period should have coincided with the temporary supersession of the monarchy. It is one of the most curious of historical paradoxes that Cromwell should ever have been acclaimed as the forerunner of 'democracy'. Of the cardinal principles of 'parliamentary democracy' he had no apprehension whatever. On the contrary, though genuinely anxious to restore a representative parliament, he was inflexibly determined to restrict its functions within narrow limits. Legislate it might, but only within the four corners of a written Constitution; the Constitution itself Parliament must not be allowed to touch. Its function, in the language of modern jurisprudence, was to be merely legislative, not constituent. On that point his second speech to the first Protectorate Parliament is conclusive :

Parliament under the Commonwealth and Protectorate

'It is true, as there are some things in the Establishment which are fundamental, so there are others which are not, but are circumstantial. Of these no question but that I shall easily agree to vary, to leave out, according as I shall be convinced by reason, but some things are Fundamentals! About which I shall deal plainly with you: these may *not* be parted with; but will, I trust, be delivered over to Posterity, as the fruits of our blood and travail. The Government by a single person and a Parliament is a Fundamental! It is the *esse*, it is constitutive. . . . In every Government there must be somewhat Fundamental, somewhat like a *Magna Carta*, which should be standing, be unalterable.'<sup>2</sup>

<sup>1</sup> 10 and 11 George V, c. 48.

<sup>2</sup> Carlyle, *Letters and Speeches*, iv, p. 60 (12 Sept. 1654).

Parliament would have none of this doctrine but, on manifesting its determination to debate 'Fundamentals', it was summarily dissolved by the Protector.

Legisla-  
ture and  
Executive

Upon another question, hardly less important, the views of Cromwell and his Parliaments were hopelessly divergent. The crucial point at issue between the Stuart kings and their Parliaments was, as we have seen, the control of the Executive. It was upon this that Sir John Eliot, described by John Forster as 'the most illustrious confessor in the cause of liberty whom that time produced', with sure instinct fixed. The existence of Parliament, as a legislature, was not at stake. There was no settled design on the part of James I or even of Charles I to supersede it. Charles indeed found the parliamentary 'hydra, cunning as well as malicious'; but had the Stuart Parliaments been willing to confine themselves to the functions prescribed to them by Bacon—to make laws, vote taxes, and keep the king accurately informed as to the state of public feeling—there would have been little cause for dispute between the Commons and the Crown. But such a subordinate position would no longer satisfy progressive Parliamentarians like Sir John Eliot and John Pym. They believed that the time had come for a long step forward; for the assumption of a larger function; that Parliament should no longer rest content with doing its legislative and taxative work, but should boldly claim to exercise a continuous control over the Executive. Parliament was to become in Seeley's phrase a 'government-making organ'. Eliot's attack upon Buckingham was inspired less perhaps by his desire to rid the country of an incompetent favourite than to vindicate the principle of ministerial responsibility. The bitterness with which Pym pursued Strafford to the block was not quite empty of personal malice; but the swiftness with which, in the first days of the Long Parliament, he swooped upon his prey, and the tenacity with which he clung to his victim, testify to his grasp upon the principle for the sake of which Eliot had perished in the Tower.

The doctrine implicitly maintained in the impeachment of Buckingham and the attainder of Strafford was explicitly asserted in the *Grand Remonstrance*, when the King was bluntly told that he would receive no supplies from Parliament unless his ministers were men 'whom Parliament had cause to confide in'.<sup>1</sup>

The claim was not conceded; Charles I died on the scaffold; Cromwell, after an interval of confusion, was called to the first place in the Commonwealth.

The problem submitted to the Stuarts had not been solved; but the contest between the Legislature and the Executive was renewed under conditions vastly different. The Stuart kings could rely only upon the prestige which attached to a monarchy, believed by many to be ordained of God and to exercise its functions as God's vicegerent on earth. Cromwell was the General of an army, finely disciplined and flushed with victories won in three kingdoms. Parliament might debate constitutional points, but power resided in the army and its chief. That Cromwell was genuinely anxious to restore Parliamentary Government, at any rate in the Baconian sense, need not be denied; of Parliamentary Government in the sense maintained by Eliot and Pym he had but slight apprehension. He derived his executive authority direct from the people, as reflected in the army, not from Parliament. 'You', said Cromwell to his first Parliament, 'have an absolute Legislative power in all things that can possibly concern the good and interest of the public';<sup>2</sup> you may make any laws 'if not contrary to the Form of Government'. Similarly, executive power is vested by the Instrument in a 'single person'. On this point no debate could be permitted. That the times demanded a strong Executive was undeniable; Cromwell alone could provide it, and so long as he lived he declined to part with the power which he believed to have come to him from the will of the people and with the sanction of God.

Cromwell  
and the  
Execu-  
tive  
Power

<sup>1</sup> § 197.

<sup>2</sup> *Ibid.*, p. 69.

Thus, the Civil War and the resulting Protectorship retarded rather than advanced the principle and the practice of Parliamentary Government. The process by which it was gradually evolved after the Restoration and still more rapidly after the Revolution will be disclosed hereafter. For the moment it suffices to insist that it is the specific quality of English Government that the Executive should be subordinate to the Legislature, and that by this quality the Parliamentary type is differentiated alike from the Autocratic and from the Presidential.

Parliamentary  
and Presidential  
Democracy

With autocracies a treatise on the modern State needs not to concern itself. The choice for the democracies of to-day lies between the Presidential and the Parliamentary form. The Swiss Republic, though, as we have seen, it possesses a President, is neither Parliamentary nor Presidential but directly democratic. The United States is definitely Presidential though, as was explained in the last chapter, there are elements in the American Constitution which permitted Mr. Wilson to describe it as Congressional. France and England are, on the contrary, like the kingdoms of Italy, Spain, Belgium, Norway, Denmark, Sweden, and others, definitely Parliamentary.

None of these governments is, however, so unreservedly Parliamentary as that of England. In all of them Parliament has a rival in the shape of the Instrument or Constitution; in some of them it has a superior. In England alone Parliament is without either legal superior or legal competitor. In fine, Parliament is Sovereign.

Parliamentary democracy, or representative government, implies, as we have seen, something more than the legislative omnipotence of Parliament; it implies also a continuous control, exercised by the legislative Sovereign, over the Executive. This quality also inheres by means of the Cabinet system in the English Government.

Its impar-  
tiality—  
the Rule  
of Law

Another marked feature of the English Government is its impartiality ; the acceptance in the fullest sense of the *Rule of Law*. With this characteristic we shall be further concerned when we come to deal with the problem of personal liberty. Summarily it may be said that it is by the supremacy of the law, and the 'ordinary' law, that the Government of England is most clearly differentiated from that of countries where, as in France, there exists side by side with the ordinary law a code of rules constituting the *droit administratif*, and where the legality of the acts of all officials from the highest to the lowest is determined not in the ordinary Courts of Justice but in the special *Tribunaux administratifs*. All Englishmen (save only the King) are legally equal before the law ; all Frenchmen are not. In England there is one law for Premier and peasant ; in France all officials can claim the protection of the *droit administratif*.

This 'impartiality' is not remotely connected with the principle of ministerial responsibility, discussed in the preceding paragraphs. The great contest of the seventeenth century decided the issue between the Crown and Parliament in relation to the Executive : it decided with equal finality the issue between a prerogative and a popular judiciary. The Prerogative Courts established or developed by the Tudors might easily, had Bacon had his way, have filled the place of the *Tribunaux administratifs* in France. The decision of the judges in the cases of the Levant merchant Bate, of Darnel and his fellow knights, above all of Hampden, might have established not the rule of law but the principle of *droit administratif*. It was the supreme merit of the Long Parliament to have asserted the supremacy of the law over the administration, and to have reaffirmed the supreme right of the citizen to the enjoyment of legal liberty.

With the principle of personal liberty the whole texture of English Government is inextricably interpenetrated : but that principle ultimately rests upon the supremacy

of the ordinary law and the impartiality of our legal administration.<sup>1</sup>

Its un-  
reality

Hardly less conspicuous than the impartiality of English institutions is their 'unreality'. It has been said with equal accuracy and cynicism that in English government 'nothing seems what it is, or is what it seems'. Bagehot hinted at the same quality when he described the English Constitution as a 'veiled Republic'. The question as to the actual functions of the Crown under a 'constitutional' monarchy is not one which need at present detain us. It is certain, however, that they are vastly different from; and in a purely political sense less important than, those performed by Henry VIII or Queen Elizabeth; yet the legal powers enjoyed by Edward VII were much the same as those of Edward VI. There are many other things in the practical working of English institutions which are not less veiled than the political activities of the Crown. Mr. Lowell has gone as far as any writer in penetrating the mysteries, yet even he leaves the curious inquirer not infrequently baffled. The relations between the two Houses of the Legislature depend on many things besides the Parliament Act of 1911; the position of a Prime Minister in relation to his Cabinet colleagues varies with each Prime Minister and can be stated, therefore, by the books only in the most general terms; the work of the permanent officials of the Civil Service and the actual part which they play in the national administration—these are all matters in which the practice may differ widely from the theory of the Constitution, even if and when the latter can be defined with tolerable accuracy.

Unitary or  
Federal

A final question remains to be answered. The English Constitution is largely unwritten, depending as much upon convention as upon law; it is in exceptional if not unique measure flexible; it represents organic growth, not a manufactured product; above

<sup>1</sup> For an alleged tendency towards the growth of administration law in England, cf. *infra*, chapter xxxi.

all it is Parliamentary, not Presidential. On none of these points is there room for doubt. As to the final basis of classification there is. Must the English Constitution be assigned to the unitary or to the federal category?

That the relations of the different portions of the United Kingdom to each other have in the past presented some appearance of federalism is plain; but it was mainly delusive. The tie which for more than a century (1714-1837) connected England and Hanover was of course purely personal, and was dissolved by the accession of a female to the English throne in 1837. Not dissimilar was the tie between England and Scotland (1603-1707), until it was drawn closer by the acceptance of the Legislative Union. There was something more of the federal element in the connexion between England and Ireland from 1496 to 1782; but the total repeal of the Declaratory Act of 6 George I, and the partial repeal of Poyning's Law in 1782, weakened the federal connexion, and from 1782 to 1800 the Union was hardly more than personal. George III was King of Ireland just as he was Elector of Hanover, just as James VII was King of England; but in none of these cases was the tie organic. Some of the more daring among the American Colonists were disposed to argue, especially after 1765, that the tie between England and the Colonies was equally personal, and that their allegiance was due only to the Crown and not to Parliament. Legally the plea was inadmissible; the legal competence of the English Parliament to legislate for the Colonies and to regulate trade, if not to impose internal taxation, was generally admitted on both sides of the Atlantic. Burke would not deny, though he refused to affirm, the right even of taxation. Clearly then was the tie more than personal. Much more than personal was the tie which connected England with Scotland and Ireland respectively after the passing of the Acts of Union. In ceasing to be personal did it become 'federal'?



Sir Herbert Samuel has argued that in the existing<sup>1</sup> relations between the three parts of the United Kingdom there is much more of federalism than is commonly supposed, and he has supported his argument not only with ingenuity but with considerable wealth of illustration. First, with reference to the Executive. In the Cabinet of 1912 there were fifteen members concerned with domestic administration. Of these four only—the Premier, the Chancellor of the Exchequer, the President of the Board of Trade, and the Postmaster-General—exercised their administrative powers uniformly in each of the three parts of the United Kingdom; and of the four only one—the Postmaster-General—includes in his jurisdiction the Isle of Man and the Channel Islands. Of the rest, three—the Chancellor of the Duchy of Lancaster and the Presidents of the Boards of Education and Local Government—are exclusively English officials; the jurisdiction of the President of the Board of Agriculture and Fisheries is also confined to England (including, of course, Wales) save in respect of the diseases of animals which would seem to be common to all parts of the United Kingdom. The Lord President of the Council and the First Commissioner of Works have jurisdiction over England and Scotland but not over Ireland; while the Home Secretary is in a curiously anomalous position: as regards industrial questions, the admission and treatment of aliens, and similar subjects he is the Minister of the United Kingdom; in a judicial capacity and as responsible for prison administration his functions are confined to England. In Scotland the Secretary for Scotland doubles or rather quadruples the parts of Home Secretary and President of the three Boards of Education, Agriculture, and Local Government, while the Chief Secretary to the Lord Lieutenant of Ireland is at once Home Secretary and President of the Local Government Board. Yet both these last-named officials, the Scottish and Irish Secretaries, as members of the Cabinet of the

<sup>1</sup> In 1912.

United Kingdom are responsible to the Imperial Parliament.<sup>1</sup>

The Legislature of the United Kingdom is theoretically unitary, but even here there is a vestige of federalism in the practice of referring Scottish Bills, after second reading, to a Grand Committee consisting of the whole body of Scottish members, with the addition of fifteen English or Irish members specially appointed for each Bill. There are also unofficial Committees of Welsh and Irish members which, though purely informal, exercise considerable influence upon the actual course of legislation. Moreover, though the Legislature itself is unitary the resulting legislation is not. Out of 458 public Acts passed during the decade 1901-10 only 252 applied uniformly to the whole of the United Kingdom.

The Judiciary is more definitely federal in character even than the Executive, much more therefore than the Legislature. Scotland in the Act of Union stipulated for the continued existence of the Court of Session, the Courts of Admiralty and Exchequer, for an independent panel of Scottish judges qualified by service in the College of Justice, and that 'the Court of Justiciary do also after the Union and notwithstanding thereof remain in all Time coming within Scotland as it is now constituted by the laws of that kingdom and with the same Authority and Privileges as before the Union'.<sup>2</sup> In particular it was ordained that 'no causes in Scotland be cognoscible by the Courts of Chancery, King's Bench, Common Pleas or in any other Court in Westminster Hall'. To this rule of complete judicial independence there is only one exception: the fact that the supreme appellate authority is vested for Scotland as for England in the House of Lords: but in that House, under the

<sup>1</sup> These and the following paragraphs were written before the changes effected by the Irish Government Act of 1922. The Chief Secretaryship has ceased to exist and the Lord Lieutenant has given place to a Governor-General.

<sup>2</sup> Article XIX.

terms of the Act of Union, sixteen Peers of Scotland have a place.

Ireland, under the Act of Union, was to retain a Court of Admiralty and a Court of Chancery, but the provisions as to a separate judiciary were less precise and elaborate than in the corresponding treaty with Scotland.

Both Scotland and Ireland retain their own Law Officers: Attorney (in Scotland known as Lord Advocate) and Solicitor-General. Ireland has in addition her own Lord Chancellor.<sup>1</sup>

Yet notwithstanding many and striking elements of federalism the Government of the United Kingdom is technically *unitary* by reason of the fact that Sovereignty over all parts of the kingdom resides in the King in Parliament.

By parity of reasoning, but with even less regard to realities, we must describe the British Empire as a unitary State, despite the existence of Legislatures, largely though not completely independent, in all the great self-governing Dominions.

The unitary character of the Empire is even more conspicuous in the executive sense than in the legislative. The King-in-Council is throughout his Dominions supreme. Hence, all questions of foreign policy, and in particular questions of peace and war, are still under the exclusive control of the Home Government—a truth conclusively demonstrated on 3 August 1914.<sup>2</sup> It should be added that the Judicial unity of the Empire is still preserved by the Judicial Committee of the Privy Council. That Committee, composed of some of the ablest and most distinguished lawyers in the Empire, still acts as a Supreme Court of Appellate Jurisdiction for the whole Empire. To the man gifted with the seeing eye

<sup>1</sup> Cf. Herbert Samuel: Paper read to the British Association and reprinted in *The Nineteenth Century and After*, for 1912.

<sup>2</sup> Cf. for fuller treatment of this question, *infra*, chapters viii, xi, xii. It should here be noted that the above words were written at a time (1920) which may well prove to be a time of rapid transition.

and the hearing ear there are few things more impressive than to penetrate into the dark recesses of the Privy Council Office in Downing Street, and, amid surroundings characteristically unpretentious to the verge of dinginess, listen in succession to cases which come before this supreme tribunal from Canada and Australia, from India and South Africa, from the Bermudas and Hong-Kong.

As yet, therefore, it is not merely permissible but obligatory to assign both the United Kingdom and the British Empire to the category of unitary States.



## VII. THE EVOLUTION OF PARLIAMENTARY DEMOCRACY

Igitur communitas regni consulatur  
Et quid universitas sentiat sciatur.

—*Political Poem, Thirteenth Century.*

'Quod omnes tangit, ab omnibus comprobetur.'—EDWARD I.

'The union of all classes of freemen, except the clergy and the actual members of the peerage, of all classes, from the peer's eldest son to the smallest freeholder or burgess, made the House of Commons a real representation of the whole nation, and not of any single order in the nation.'—FREEMAN.

'The English Parliament strikes its roots so deep into the past that scarcely a single feature of its proceedings can be made intelligible without reference to history.'—SIR COURTENAY ILBERT.

'Cardinal Wolsey's ambition first brought in the privy counsellors and others of the King's servants into the House of Commons from which they were anciently exempted. The effects are the Commons have lost their chief jewel (freedom of speech).—ELSYNGE, *The Manner of Holding Parliaments*, p. 171.

'Those persons made up the Committee of State, which was reproachfully afterward called the Junto, and enviously then in Court the Cabinet Council.'—CLARENDON.

'REPRESENTATIVE democracy', wrote a distinguished German publicist, 'originated in North America.' If the term 'democracy' is to be taken as synonymous with 'republic', Dr. Bluntschli was justified in his statement, and the context would seem to indicate that such was his intention. If, on the other hand, by 'democracy' is meant any form of government in which the will of the many predominates alike in legislation and in administration, then the origin of the representative type of democracy must be ascribed to England.

Parliamentary  
Democracy

American democracy is, however, undeniably 'representative' not less than that of England; it seems necessary, therefore, to seek for a more precise term by which to differentiate the English type from the American; and both from the Swiss. The Swiss type we have designated as 'referendal', the American as 'Presi-

dential'; for the English type we have reserved the distinctive epithet of 'Parliamentary'.

The term would seem to be justified by two features brought into strong relief in the preceding chapter: on the one hand by the omnipotence of the Sovereign Legislature—the King in Parliament—on the other by the responsibility of the Executive to the Legislature. The Constitution of the United States knows neither characteristic: in the Government of England both stand out pre-eminent.

The parliamentary type of democracy is peculiar to the modern world; down to the end of the eighteenth century it was peculiar to England; but during the last one hundred years several of its distinctive characteristics have been embodied, in avowed imitation of England, in many modern Constitutions. This fact seems to justify an attempt to indicate briefly but with precision the main stages in the evolution of this novel form of government in the country of its origin.

Primitive  
Democracy  
direct

Primitive democracy, as it existed among the embryo nations of the modern world, was direct; it took the form of the *Landsgemeinden*, which, as we have seen, still survive in some of the Swiss cantons. The same form existed among our Anglo-Saxon ancestors, who derived it from the same common stock of Teutonic institutions. Ultimate authority was vested in the host in arms: 'about less important matters,' wrote Tacitus, 'the chiefs deliberate; about the more important the whole people.' In this general Assembly of the *omnes* all questions of high policy—war, peace, alliances—were decided; by it the distribution of lands among the communities was regulated; the young men were invested with arms and admitted to citizenship; all officers, whether to administer justice or to lead the host in war, were appointed.

Direct democracy is applicable, however, in its primitive form, only to the smallest communities.

The Village  
Folk-moot

The primary political unit of the Anglo-Saxons was the *Township*, afterwards utilized for ecclesiastical purposes by

the organizers of the Church polity in England as the *Parish*. The affairs of the village community, the township or parish, were administered by the men of the locality in their Folk-moot or parish meeting. In the smallest of parishes the primitive form still survives, or rather was revived after the lapse of many centuries by the Local Government Act of 1894. It was not long, however, before the idea of representation obtruded itself in English institutions.

In the courts of the hundred and shire the township was represented as a unit by its reeve (*praepositus*) and four men of the better sort (*quatuor meliores homines*). These same men also represented the township when the King's justices in eyre (or circuit judges) visited the localities. The object of these judicial visitations was threefold: they were intended (1) to keep the central administration (the King's Court) in touch with local administration; (2) to administer justice and preserve order; and (3) to collect the King's dues and, later, to assess taxation. The fiscal and judicial duties of these itinerant justices, or travelling commissioners, were indeed inextricably intertwined. *Iustitia est magnum emolumentum*. This aphorism expressed the literal truth. It is not too much to say that from this archaic confusion the idea of political representation gradually emerged. What were the four good men and the reeve of the township doing in the court of the hundred or shire? They were there primarily to answer for the public order of the township, and, secondarily, to answer for its contribution to the public exchequer. In the Shire Court the representatives of this political unit came face to face with the King's Justice—the representative of the central administration. Before the end of the twelfth century a new principle crept in: to the idea of *representation* was added the idea of *election*. According to the *Form of Proceeding on the Judicial Visitation of 1194*, three knights and one clerk are to be elected in each shire to act as *custodes placitorum coronae* or coroners: and the election, be it

The Idea  
of Repre-  
sentation:  
Hundred  
and Shire  
Courts



observed, is to take place in the county court. The introductory clause of the same *Forma Procedendi* is further significant as providing for the election of the grand jury. With the idea of representation long familiar to every villager, with that of election becoming more common every day, it called for no great effort of political imagination to suggest the idea of bringing into the national council representative and elected persons to assent, on behalf of their localities, to the taxation demanded by the Crown.

Central  
Represent-  
tation

This step, almost an obvious one but destined to be of first-rate political importance to England, and indeed to the whole modern world, was first taken in 1213. In that year King John, under the stress of financial and political necessity, summoned, by writ addressed to the sheriff of every county, four discreet knights to attend a national council 'ad loquendum nobiscum de negotiis regni nostri'. A few months earlier he had similarly directed the sheriffs to send to St. Albans four men and the reeve from every township in the royal demesne, to assess the amount of compensation to be paid to the bishops who had suffered during the interdict. Here, then, we have the origin of county and borough representation in the central assembly of the nation. One or two points are noteworthy. The machinery employed is that which for long time had been familiar: that of the Shire Court and the Sheriff. Again, the four knights of the county and the *four men and the reeve* of the township have an equally familiar sound. From time immemorial these four men and the reeve have represented their townships in the Court of the Shire. Nothing more is now called for but to send them on, at the King's bidding, to St. Albans. Thus by the easiest of stages was the fateful transition from local to national representation accomplished.

The  
Experi-  
mental  
Period  
1213-95

Between 1213 and 1295 we have a period of somewhat confused experiment. It was as yet obviously uncertain what direction things would take. The Great Charter of 1215, eminently baronial, not to say oligarchical in tone, did nothing to advance national representation.

During the minority of Henry III a struggle ensued between the English Baronage on the one hand, and the Pope and his agents on the other, for supremacy in England. No advantage was likely to accrue from such a contest to the cause of Constitutional development. But, nevertheless, the long minority was not void of significance. The Council acquired a new importance. With the young King's personal assumption of the reins of government things began to hasten towards a crisis. An extravagant weakling, a mere tool in the hands of the Papacy, Henry III soon found himself confronted by an opposition which had some real claim to be regarded as national. A leader of consummate ability emerged in the person of Simon de Montfort. As early as 1246 Matthew Paris speaks of a great national assembly in London as a *Parliamentum generalissimum*. The bishops were there, abbots and priors, earls and barons. Plainly, this was a national council of the old type, though under a new title. To the Council of 1254, however, the King summoned, again by writ addressed to the sheriffs, two knights to be elected in each county court, to inform the King what aid he might expect from the counties for the relief of his pressing financial embarrassments (*quale auxilium nobis in tanta necessitate impendere voluerint*).

The year 1261 afforded still more significant proof of the increasing importance of these county representatives. The Barons, now in open opposition, summoned three knights from each shire to meet them at St. Albans 'to treat of the common business of the realm'. The King, on the contrary, bade the sheriffs dispatch the knights to him at Windsor. To the Parliament of 1264 four knights from each county were summoned. To the famous Parliament of 1265 Simon de Montfort, in the King's name, summoned five earls and eighteen barons, a large body of clergy, two knights from each shire, and two citizens from each of twenty-one specified towns. On the strength of this assembly Simon has been styled the 'founder of the House of Commons'. That title cannot be justly attributed to

Simon de  
Montfort

any single man, not even to Edward I, certainly not to Simon de Montfort; yet there is a special significance attaching to Simon's Parliament. It is true that for the first time representatives of the towns were brought into political conjunction with barons, knights, and clergy. The conjunction is significant. But, more closely examined, the assembly of 1265 is seen to 'wear very much the appearance of a party convention' (Stubbs). Of barons there were only a handful—the partisans of Simon; of the clergy—his strongest supporters—a large and wholly disproportionate number; of the towns, only 21, as compared with 166 summoned in 1295 by Edward I. The towns, moreover, were selected with obvious care, and the writ was directed not to the sheriff of the county, but to the mayors of the chosen towns. There is good ground, therefore, for the cautious insinuation of Bishop Stubbs. None the less, Simon's Parliament, whatever the motives of its convener, does mark an important stage in the evolution of the House of Commons.

Edward I From 1265 to 1295 we are once more in the region of uncertainty and experiment. There were several 'Parliaments' after the battle of Evesham, but whether knights and burgesses were included in them we cannot tell. In 1273 four knights from each shire and four citizens from each town joined the magnates in taking the oath of fealty to the absent King. The Statute of Westminster the First (1275) was, on the face of it, made with the assent of the 'community of the realm' as well as the magnates lay and ecclesiastical. In 1282 a curious experiment was tried. The King and the magnates being in Wales, the sheriffs were bidden to summon to York and Northampton respectively representatives of the towns and counties, together with 'all freeholders capable of bearing arms and holding more than a knight's fee'. The Archbishops of the two Provinces were similarly enjoined to summon through the bishops the heads of the religious houses and the proctors of the cathedral clergy. For an instant it seemed as though the ecclesiastical provincialism of the

Church might overbear the tendency to nationalism. The experiment was not indeed repeated, but the jarring tendencies of provincialism and nationalism were not yet reconciled, nor was the victory of one or other assured. In September 1283 two knights were summoned to a national council together with two 'wise and fit' citizens from London and twenty other specified towns. Here it will be observed that Edward I followed exactly the precedent of 1265, both as to the number of towns and the mode of summons, the writs being addressed to the mayors and bailiffs. In the Parliaments of 1290 and 1294 the towns were left out; with that of 1295, however, we reach the close of the experimental period and the real beginnings of regular parliamentary history.

The Parliament of 1295 marked a stage of first-rate importance in the evolution of representative government. It contained a full and perfect representation of the Three Estates of the Realm—the Baronage, the Clergy, and the 'Commons'. Of the baronage there were forty-eight members, seven earls and forty-one barons, summoned individually by name. They were charged to come upon 'the faith and homage' or the 'homage and allegiance whereby you are bound to us'. Similarly, the archbishops, bishops, and the greater abbots were summoned individually, but on the ground not of homage and allegiance (though the bishops had and still have to do homage for the temporalities of their sees) but of 'faith and love'. Of bishops there were twenty, of abbots sixty-seven, besides three heads of monastic orders. But the representation of the Clerical Estate was not confined to the princes of the Church. The bishops were bidden by the *Praemunientes* clause to bring with them the dean or prior of the cathedral church, the archdeacons, one proctor representing the capitular, and two proctors representing the parochial clergy of the diocese. The Third Estate, that of the Commons, was summoned by writs addressed to the sheriffs of the shires who were to cause two knights of each shire, two citizens of each

The  
Model  
Parlia-  
ment of  
1295

city, and two burgesses of each borough to be elected and bring with them full powers to carry out what should be ordained by common counsel. The knights were elected by the full county court ; by whom the representatives of the towns were actually elected is less clear, though a return of the election was made, it would seem, to the sheriff in the shire court. The number of cities and boroughs represented in the reign of Edward I was 166 ; the number of counties 37 ; the ' Commons ', therefore, assuming the summons to be regularly and generally obeyed, numbered in all 406.

An Assem-  
bly of  
Estates

The theory of representation was, be it observed, by *Estates*.<sup>1</sup> ' An assembly of Estates ', according to Bishop Stubbs, ' is an organized collection, made by representation or otherwise, of the several orders, states or conditions of men who are recognized as possessing political power.'<sup>2</sup> The principle at the root of parliamentary government in England was, then, twofold : vocational and local ; the idea of the representation on the one hand of classes or interests ; on the other of places. The baronial estate rested, it would seem, on the idea of tenure ; a peer of Parliament (to use a later description) was a person who held a baronial estate ; a baronial estate was one which entitled the holder to an individual summons to Parliament. Thus a ' barony ' depended in early days upon the caprice of the Crown, and the number of ' peers of Parliament ' varied considerably from reign to reign and even from Parliament to Parliament. In 1295 it was, as we have seen, 48 ; in the first year of Edward III it had risen to 86, but by the first year of Richard II it had fallen to 60 ; by 1399 to 50, and by 1422—the first year of Henry VI—to 23. By that time, however, a new method for the creation of all peerages had become established. In 1377 Edward III issued *Letters Patent* creating his son the Black Prince Duke

The  
Barons

<sup>1</sup> For a contrary view, and an erudite argument in support of it, cf. Pollard, *Evolution of Parliament*, c. iv.

<sup>2</sup> *Constitutional History*, II. 163.

of Cornwall. Richard II used the same method for creating barons; by Henry VI it had become the established method for all grades of the peerage.

As an *Estate* the barons originally enjoyed, like the two other Estates, fiscal independence, the right of voting separately their aids to the Crown; but before Parliament was a century old it had become usual for Lords and Commons to combine in their grants of 'tenths and fifteenths', 'tonnage and poundage', and other imposts. A new formula came into use in 1395 which has since been used without variation, grants being made 'by the Commons with the advice and assent of the Lords Spiritual and Temporal'. Thenceforward the Commons enjoyed a pre-eminence in finance which became more and more pronounced until by the culminating Act of 1911 the peers were deprived of all control over Money Bills.

The Estate of the clergy was even more unambiguous than that of the baronage. The bishops took their place in Parliament in a double capacity: as holders of 'baronies', as tenants of land held direct from the Crown, and as rulers of the Church. The abbots, like the lower clergy, were impatient of the obligation to attend Parliament, and pleaded that they were not called upon to do so unless they held their lands by military tenure: unless, that is to say, they were technically 'barons'. As a fact the number who were summoned to attend rapidly declined: it was sixty-seven under Edward I, but under Edward III had fallen to twenty-seven, the figure at which it remained until the dissolution of the monasteries. The lower clergy refused, almost from the first, to take the place in the National Council assigned to them by Edward I, and until the seventeenth century they maintained all the attributes not merely of a distinct but of a separate Estate. In particular they clung with ever-watchful jealousy to the right of separate taxation. Down to 1294 the clergy, like the barons and the cities, made their own grants to the Crown at a rate determined by themselves. After 1295 it gradually became customary for the clergy, as regards

The  
Clergy

the rate, to follow the example of the other Estates. But there was to be no confusion as to the origin of the grant : it was to come from the clergy in their separate Convocations. This practice continued until the privilege was surrendered by a verbal arrangement between Archbishop Sheldon and Lord Chancellor Clarendon in 1663. Since that date the clergy have ceased, for all practical purposes, to be an Estate of the realm, and have merged into the general body of the community.

The  
Knights

For some time it was doubtful whether other Estates might not establish their separate existence within the community. Even more doubtful was the disposition of the Three Estates in two Houses of Parliament. The latter arrangement was indeed, as will be seen presently, peculiar to England. At one time it seemed likely that the knights, belonging to the same social class as the barons, and united with them in economic interests, would throw in their lot with the baronage. They followed the barons in the rate of their grants to the Crown, and they may have sat with them. Or, if not united with the baronage, they might have formed, as in Aragon, an Estate and House of their own. They are recorded as sitting by themselves in 1331 and in 1332, and it may by then have become the practice. Certain it is, however, that by the middle of the same century the knights had definitely separated from the baronage, and, what is more remarkable and infinitely more important, had permanently amalgamated with the representatives of the towns. For the causes which operated to produce this union—perhaps the most fateful event in the Constitutional history of England—the reader must be referred to the classical work of Bishop Stubbs.<sup>1</sup> No words can exaggerate its significance.

The  
Lawyers

The knights or lesser landowners were not the only class who might well have become a separate Estate. The lawyers were in a favourable position for establishing their right to this distinction, and seemed at one time not

<sup>1</sup> Vol. ii, § 191 seq. ; iii, § 426 seq.

unlikely to press it. The judges of the High Court and the law-officers of the Crown have from time immemorial received a summons to attend the King in Parliament; and they are still enjoined 'to be at the said day and place personally present with us and with the rest of our Council to treat and give [your] advice upon the affairs aforesaid'. In obedience to the summons the judges attend the opening of Parliament, but they have never established their right to a permanent place there. In the Parliament of 1381 their position appears to have been co-ordinate with that of other Estates, for the Commons in that year petitioned the Crown that 'the prelates, peers, knights, judges, and *all the other Estates*,' might debate severally. But their presence was probably due to, and may certainly be explained by, the confusion between the House of Lords and the *Magnum Concilium* which practically lost itself in that House and handed on to it the judicial and conciliar functions it had previously performed.

More substantial than the claim of the lawyers to separate Estateship was that of the merchants. Borough representation was in effect the representation of the traders; but its basis was local not vocational. The merchants were fiscally strong enough to make their independent arrangements with the Crown, and the fact that they were encouraged to do so by the Crown itself constituted a serious menace to the solidarity of the Third Estate. The position was further complicated by the fact that the 'customs', being regarded as fees for licence to trade, were naturally the subject of direct bargaining between the King and the merchants, to whom the licences were granted. None the less the practice was a dangerous one, and called for decided action on the part of the Commons. The Commons were fully alive to the danger, and in 1362 Parliament enacted that henceforward 'no subsidy or charge should be set upon wool by the merchants or any other body without consent of Parliament'. There was further legislation on the subject

The Merchants



in 1371 and 1387, but how imperfectly the confusion was cleared up was proved by the controversy as to 'impositions' and 'tonnage and poundage' under the first two Stuarts. We may take it, however, that by the end of the fourteenth century the doctrine was established that there should be no taxation without consent of Parliament; that, in consequence, the danger of the multiplication of Estates had been finally dissipated and the principle of local representation successfully affirmed.

Bicame-  
ral struc-  
ture

To this result the peculiar structure of the English Parliament powerfully contributed. Elsewhere in Europe representative Assemblies were, at about the same time, coming into existence. Of these, some were organized in three, some in four branches. Under a system of 'Estates', three Chambers would appear the most obvious formation, and the English Parliament would probably have assumed this shape but for two reasons: the class-consciousness of the clergy which led them to prefer their provincial Convocations to the National Assembly; and the fortunate coalescence of the lesser landowners and the burghers, which, in place of an Estate of merchants or towns, gave us a House of Commons—a House in which all classes except the peers, temporal and spiritual, were ultimately to find representation. The representatives, however, met at Westminster, not as the delegates of special interests, economic or social, but as representatives of local communities.

Should it appear to some that undue emphasis has been laid upon this feature of English Constitutional development, a sufficient explanation will be found by following the history of parliamentary institutions in France and Spain. The Cortes of Aragon, more than a century older than our own Parliament, the Cortes of Castile, and the States-General of France, all started with a promise of permanence at least equal to that of the English Parliament. The Spanish Assemblies barely survived into the sixteenth century; the States-General never met after 1614 until the eve of the Revolution in 1789. The secret

of the rapid decadence and early demise of these Assemblies lay in the fact that the basis of representation was social or economic, not political, and that consequently the Crown, both in France and Spain, was able to play off one class interest against another—the traders against the landowners; the clergy against both—and so secure its own supremacy. A similar fate might have overtaken the English Parliament had not the knights, by uniting with the burghers, formed a connecting link between the landowners and the merchants, and so conserved the liberties of both.

The bicameral system, in its origin fortuitous, has in modern times approved itself on grounds of high expediency alike to political theorists and to the practical architects of Constitutions. Both with the theory and the practice we shall have to concern ourselves later. Here it must suffice to insist that but for the fortunate accidents—they were hardly more—which led to the evolution of this structural form in England, it is doubtful whether the principle of representative democracy would have survived the experimental stage.

By the end of the fourteenth century the English Parliament had not only assumed its modern form, but had acquired its essential powers and privileges: its exclusive right over taxation; its right to share with the Crown in the making of laws; and a species of control over the administration. The fifteenth century witnessed a more precise and detailed definition of the rights established in the previous period—a 'hardening and sharpening' in Stubbs's phrase—but it was chiefly remarkable for the premature trial and conspicuous failure of a constitutional experiment which is of peculiar interest to students of political institutions.

Develop-  
ment of  
Parlia-  
ment in  
four-  
teenth  
and fif-  
teenth  
centuries

The 'Revolution' of 1399 was partly oligarchical in character, partly ecclesiastical, and wholly conservative. Alike by temperament and by necessity, the Lancastrian kings were inclined towards parliamentary methods. Consequently, under Henry IV and Henry V, an attempt

was made to secure to Parliament not merely a general control over the Executive but the actual appointment of the Council. Thus in 1404, 1406, and 1410, Henry IV nominated the members of his Council in Parliament, and on the death of Henry V (1422) it was Parliament which nominated the Privy Council to be a Council of Regency during the minority of Henry VI. The attempt to make Parliament the direct instrument of government was, however, a disastrous failure: partly because it was premature, partly because the time was unpropitious. The reigns of the Lancastrians were throughout 'unquiet', and in the hands of a weak king like Henry VI the Executive proved impotent to control the forces of social disorder. Consequently, the whole country was plunged into chaos: all the evils of a 'bastard feudalism' reappeared without the redeeming features which had justified and ennobled the feudal system in earlier days; wars broke out between noble and noble, county and county, town and town; the administration of justice became a by-word; to secure a verdict both judge and jury must be bribed. In the *Letters of the Paston Family* the England of the fifteenth century lives again: the picture is one of complete social disintegration and pitiable administrative impotence.

The Tudor Dictatorship From this 'lack of governance' England found relief in the dictatorship—in the main benevolent and wholly salutary—of the Tudors. From the discipline of the sixteenth century the whole nation emerged braced and invigorated. Not the least of the advantages secured by the strong rule of the Tudors accrued to Parliament. At the end of the fifteenth century Parliament, exhausted by its premature efflorescence, seemed like to perish. By the end of the sixteenth century, broadened by the creation of a large number of new constituencies, mainly in growing towns, and infused with the stiff temper of Puritanism, Parliament was ready and anxious to embark upon a fresh struggle for ancient privileges and new prerogatives.

The contest of the

The spirit in which Parliament plunged into the

contest is accurately reflected in the *Commons' Apology* of 1604. From that interesting but lengthy document <sup>1</sup> one sentence may be cited in illustration :

seven-  
teenth  
century

‘ And contrarywise, with all humble and due respect to your majesty our sovereign lord and head, against those misinformations we most truly avouch,—first, that our privileges and liberties are our right and due inheritance, no less than our lands and goods ; secondly, that they cannot be withheld from us, denied or impaired, but with apparent wrong to the whole state of the realm ; thirdly, and that our making of request, in the entrance of Parliament, to enjoy our privilege, is an act only of manners, . . . ’

The language may be reasonably respectful, but the temper is unmistakably truculent. Parliament was obviously spoiling for a fight. The pedantry of James I and the obstinate fanaticism of Charles I offered it an opportunity if not an excuse. With details we are not here concerned ; it is enough to insist that the prize for which the contest was fought was nothing less than the sovereignty of England. Was sovereignty to remain vested in the Crown, or to be transferred to a Parliament consisting of King, Lords, and Commons ? In the latter alternative, how was it to be exercised ?

For a quarter of a century James I, and his son after him, attempted the task of reconciling the Stuart theory of kingship—the doctrine of Divine Right—with the advancing claims of Parliament and more particularly of the House of Commons. The principles were in truth irreconcilable. In the Civil War an attempt was made to cut the knot by the sword. It failed. The war proved—and the lesson was further enforced by the experience of the Commonwealth period—that if Parliament was essential to the idea of Constitutional Monarchy, the Crown was essential to the development of parliamentary government. Consequently the Restoration of 1660 was as much a restoration of Parliament as a revival of Monarchy.

<sup>1</sup> For full text cf. *Statutes and Documents* (ed. Prothero), p. 286.

The  
Cabinet  
System

With the Restoration the revolutionary interregnum ended and the orderly processes of evolution were resumed. But the essential problem of the seventeenth century was unsolved: Where did sovereignty reside? To whom was the Executive responsible? By whom was it to be controlled?

The practical answer to this question was found in the evolution of the *Cabinet*.

This, most distinctive of English political institutions, came, not by observation, but arose in characteristic English fashion, partly as a natural development from existing institutions, partly as a result of mere chance. The principle of ministerial responsibility was asserted by Eliot, and insisted upon by Pym, as an essential condition of any permanent accord between Crown and Parliament. Something like a Cabinet was evidently in existence in 1640. 'Those persons', writes Clarendon (meaning Archbishop Laud, Lord Strafford, Lord Cottington, Lord Northumberland, Bishop Juxon, Sir H. Vane, Sir F. Windebank, and the two Secretaries of State), 'made up the Committee of State, which was reproachfully afterwards called the Junto, and enviously then in Court the Cabinet Council.'<sup>1</sup>

One thing, however, was lacking: 'those persons' did not possess—as a body—the confidence of Parliament. A year later the *Grand Remonstrance* made it plain that there could be no lasting harmony between the Executive and the Legislature, unless the King were prepared 'to employ such Counsellors . . . as the Parliament may have cause to confide in'.

Charles II  
and the  
Privy  
Council

After the Restoration Charles II found himself confronted by a practical dilemma. Policy dictated the advisability of numerous promotions to the Privy Council, but, as a result, the Council became impossibly large for the dispatch of business. Moreover, Charles II, quick-witted and pleasure-loving, was frankly bored, as Clarendon tells us, by the debates in the Council. Clarendon

<sup>1</sup> Clarendon; *Rebellion*, Bk. II (vol. i, p. 244).

accordingly proposed that the administrative work of the Council should be delegated to four small Committees : one for foreign affairs ; a second for the supervision of the army and navy ; a third for trade ; and a fourth for the consideration of petitions of complaint. In these Committees of the Council the modern administrative system may be said to have its origin. But in addition to these formally recognized Committees there was an informal Committee in which we have the germ of the modern Cabinet.

The new development was regarded with extreme disfavour by old-fashioned Constitutionalists, and, in particular, by Parliament. Although the future of the *Cabal* was very far from being discerned, various schemes were devised to arrest the development, and at the same time to evolve order out of the chaos which prevailed in Parliament and to restore harmony between Parliament and the King's Ministers. One of these, devised by Sir William Temple, actually came to fruition and was tried in 1679. Temple's Privy Council was to consist of thirty members : fifteen office-holders and fifteen unofficial members of great wealth and political influence ; but a Council of thirty is too small for deliberation, and too large for Executive purposes, and things quickly relapsed into the position from which Temple's scheme was intended to extricate them. Within a few months the King was again holding consultation only with a small knot of statesmen. From this practice neither Charles II nor his successors ever afterwards departed. Temple's short-lived experiment had proved itself impotent either to restore to the Privy Council its constitutional place and importance, or to arrest the development of the convenient but unconstitutional substitute, soon to take form as the Cabinet.

Temple's  
scheme

On the initiation of Temple's scheme, in 1679, the King bade farewell to his Privy Council in these significant words : ' His Majesty thanks you for all the good advice which you have given him, which might have been more

frequent if the great numbers of the Council had not made it unfit for the secrecy and dispatch of business. This forced him to use a smaller number of you in a foreign committee, and sometimes the advice of some few among them.' <sup>1</sup> These words were in effect a funeral oration : the old Privy Council as an Executive body was dead.

The  
Party  
system

Meanwhile, the Cabinet developed rapidly. Its evolution was materially assisted by the growth of the party system in Parliament. The origin of that system is commonly ascribed with over-precision to the year 1679. It was then no doubt that the party labels, Whigs and Tories, were first affixed to the two parties which desired respectively the passing and the rejection of the Bill for the exclusion of the Duke of York from the succession. The historic parties may, however, more properly be said to originate in the debates of the Long Parliament, and particularly in the discussions on the Grand Remonstrance. But be this as it may, Whigs and Tories, as organized parliamentary parties, were becoming clearly defined by the Revolution of 1688.

The Whig  
Junto :  
1697

For the first years after the Revolution William III selected his Ministers indifferently from the two great party camps. But the expedient, though well meaning, did not work, and Sunderland persuaded the King to confide the great offices of State exclusively to the leaders of the Whig party, at that time predominant in Parliament. To this year, and to the formation of the Whig Junto, Macaulay seems to attach an exaggerated importance. Sunderland's *Junto* of 1697 may indeed be regarded as the first homogeneous Ministry, and, as such, it registers an important stage in the evolution of the modern Cabinet. Further, it is the first Cabinet which intentionally reflected the parliamentary majority for the time being. But that evolution was very far from being complete in 1697. The two essential features were still lacking : the Ministry owned no conscious subordination to a common political chief ; and the King still presided

<sup>1</sup> Temple, *Memoirs*, iii. 45.

in person at the meetings of his Cabinet. William III was in fact, as well as in theory, the head of the Executive Government. He was a 'President'; he had no Prime Minister. Towards the end of his reign another attempt, determined and deliberate, was made to arrest the progress already made in the direction of Cabinet government, and to reconstitute the authority of the Privy Council. Section III of the Act of Settlement (1701) enacted 'that . . . all matters and things relating to the well governing of this kingdom which are properly cognizable in the Privy Council by the Laws and Customs of this realm shall be transacted there, and all resolutions taken thereupon shall be signed by such of the Privy Council as shall advise and consent to the same'. The same section further provided 'that no person who has an office or place of profit under the King or receives a pension from the Crown shall be capable of serving as a member of the House of Commons'. Fortunately for the constitutional evolution of England neither of these provisions ever became operative. The first was repealed by Statute (4 & 5 Anne, c. 20, § 27) in 1705; the second was modified so as to permit Ministers of the Crown to seek re-election to the House of Commons after the acceptance of office.

But despite the removal of these obstructions little progress was made with the development of the Cabinet principle under Queen Anne. The Queen had no intention of surrendering to Ministers her personal initiative in matters of State. Like her predecessor she frequently presided at Cabinet Councils, and the policy adopted there was to a large extent her own. But one significant step must be marked. The Queen's sympathies were entirely with the Tory party, and the Whig Ministers who dominated the Council during the middle of the reign were forced upon the Queen, despite her personal inclinations. Particularly was this the case with the appointment of Lord Somers to the Presidency of the Council in 1708. The Queen was not without compensation: the irresponsi-

Queen  
Anne and  
her  
Ministers



bility of the Crown was finally established. 'For some time past', said Rochester in 1711, 'we have been told that the Queen is to answer for everything, but I hope that time is over. According to the fundamental constitution of the kingdom the Ministers are accountable for all. I hope nobody will, nay nobody durst, name the Queen in this connexion.'<sup>1</sup> Nevertheless the Queen continued not merely to reign, but actually to rule. The Ministers were still, although to a diminishing extent, her 'servants'; the policy which they pursued was inspired by her personal wishes.

George I  
and  
Walpole

The real point of transition is marked by the accession of the first Sovereign of the House of Hanover. George I was the first 'Constitutional' King of England in the narrower acceptation of that term; he reigned but he did not rule. Henceforward the dividing lines of English history are to be found not in the accession of successive Sovereigns but in the changes of Ministries. For the consummation at this particular juncture of a development which had been long in process two things were in the main responsible: first, George I was a German, with no command of the English tongue and a languid interest in English politics; and next, supreme power fell into the hands of a man of exceptional strength and tenacity of character. To Sir Robert Walpole belongs the distinction of having been the first really to define our Cabinet system, of having been himself the first Prime Minister in the true and complete sense of the term.

'At whatever date', writes Lord Morley of Blackburn, 'we choose first to see all the decisive marks of that remarkable system which combines unity, steadfastness, and initiative in the Executive, with the possession of supreme authority alike over men and measures by the House of Commons, it is certain that it was under Walpole that its ruling principles were first fixed in Parliamentary government and that the Cabinet system received the impression that it bears in our own time.'<sup>2</sup>

<sup>1</sup> *Parliamentary History*, vol. vi, p. 972.

<sup>2</sup> *Walpole*, p. 142.

‘It was Walpole’, writes another distinguished publicist, ‘who first administered the Government in accordance with his own views of our political requirements. It was Walpole who first conducted the business of the Country in the House of Commons. It was Walpole who in the conduct of that business first insisted upon the support for his measures of all servants of the Crown who had seats in Parliament. It was under Walpole that the House of Commons became the dominant power in the State, and rose in ability and influence as well as in actual power above the House of Lords. And it was Walpole who set the example of quitting his office while he still retained the undiminished affection of his King for the avowed reason that he had ceased to possess the confidence of the House of Commons.’<sup>1</sup>

The several implications of the Cabinet system may be more appropriately discussed in a later chapter.<sup>2</sup> By the reign of George II the system was in outline complete. Down to the accession of the Hanoverians the policy of the country was the policy of the Crown ; the King ruled as well as reigned. Thenceforward the King was in the main bound to accept the advice tendered to him by ministers responsible to Parliament. Until that time the Crown had been served by ministers ; thenceforward the country was governed by a Ministry. Even in the embryo Cabinets of the seventeenth century there was no solidarity ; between ministers there was no mutual responsibility ; nor were individual ministers in any real sense responsible to Parliament. If the King consulted ministers it was merely for his own convenience ; consequently, no minister felt bound to resign if his advice was ignored. ‘He always gave good advices,’ wrote Burnet of Ormond, ‘but when bad ones were followed he was not for complaining too much of them.’<sup>3</sup> Nor did the King limit his consultations to ‘ministers’. While Clarendon was still nominally the chief adviser of Charles II, the King’s real councillors were, according to Pepys, ‘my Lord Bristol, the Duke of Buckingham, Sir Henry Bennet, my Lord

<sup>1</sup> Hearn, *Government of England*, p. 220.

<sup>2</sup> *Infra*, c. xxv.

<sup>3</sup> *History of my Own Time*, p. 63.

Ashley, and Sir Charles Berkeley, who, amongst them have cast my Lord Chancellor on his back past ever getting up again.' <sup>1</sup> Clarendon, though the chief official adviser of the Crown, was not a Prime Minister, nor was Danby. The Prime Minister was a product of the Cabinet system.

From Walpole's day onwards all was changed: not at once, but as a result of gradual evolution. Politically homogeneous in composition; drawn from and responsive to the party commanding a majority in the House of Commons; its members acknowledging mutual responsibility and united in subordination to a first minister—such was the Cabinet as it finally emerged from the political vicissitudes of the eighteenth century. Such it remained down to December 1916. Did it then reach the term of its development? Will the constitutional upheaval leave this key-institution unscathed? To these questions we shall return.

The evolution of the Cabinet system supplied the solution to the problem of Parliamentary sovereignty. The issue of the contest of the seventeenth century rendered it certain that supreme power must pass from the Crown to the King-in-Parliament; it still remained uncertain how the new Sovereign was to exercise the power thus transferred. The answer was found, by a happy combination of design and accident, in the Cabinet.

The Set-  
tlement  
of 1688

Thus were the two main conditions of parliamentary democracy fulfilled. That peculiar form of government implies on the one hand, as we have seen, an omnipotent Legislature, and on the other a responsible Executive. Both doctrines were implicitly involved in the success of the parliamentary party in their conflict with the Stuart monarchy, but their complete vindication was in no small measure due to the fact that the English Constitution is an aggregate of precedents and conventions and has never been embodied as a whole in a Constitutional Code. The

<sup>1</sup> Pepys's *Diary*, May 15, 1663; cf. Blauvelt, *op. cit.*, p. 44.

likeliest moment for such an attempt was in 1688. Political philosophy was in fashion. Locke's *Treatises on Civil Government* provided an apology for a *fait accompli* rather than a programme of projected reform. But the *Act of Settlement* was still to come and might have been elaborated into a Constitutional Code. Was the genius of English institutions too strong for the doctrinaires? Or were the Whig statesmen warned off from the attempt by the failure of the written Constitutions of the Commonwealth and the Protectorate? Be the reason what it may, the attempt was not made. The opportunity which French or American statesmen would undoubtedly have seized was ignored by the enlightened men who, at one of the most critical moments in her history, guided the destinies of England. All that the occasion actually demanded was included in the two great documents of the period: the *Bill of Rights* and the *Act of Settlement*; but not a line more than was required to meet the emergency of the moment. The illegal and arbitrary acts of James II were recited and condemned: the suspending power and the dispensing power 'as it hath been assumed and exercised of late', the Court of High Commission and similar courts, the levying of taxes and the maintenance of a standing army without consent of Parliament, were declared illegal; the rights of free speech, freedom of election, and of petition were affirmed, and provision was made for the settlement of the Crown on Protestant princes. No more. The way was left open, in effect if not by design, for the development of the Constitution on such lines as further experience might dictate.

The problem of Sovereignty was solved, the relations of Legislature and Executive defined, with unexpected promptitude; Scotland was brought into a legislative union within a few years; but it was more than a century before any attempt was made to broaden the basis of the electorate or to redistribute the electoral constituencies with some regard to the changes in the distribution of population and wealth; the penal laws were not formally

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cracy

repealed nor were Dissenters or Roman Catholics or Jews admitted to full civil rights until well on in the nineteenth century ; there was no legal readjustment of the relations of the two legislative Chambers until the twentieth. The processes of political evolution cannot be hurried ; conventions need time to establish their validity ; but the result has thus far been regarded with justifiable complacency by ourselves, and for the most part with admiration if not with envy by competent observers in other lands.

‘ Many persons in whom familiarity has bred contempt, may think it a trivial observation that the British Constitution, if not (as some call it) a holy thing, is a thing unique and remarkable. A series of undesigned changes brought it to such a condition, that satisfaction and impatience, the two great sources of political conduct, were both reasonably gratified under it. For this condition it became, not metaphorically but literally, the envy of the world, and the world took on all sides to copying it.’

Apolo-  
gists and  
Eulogists

It is a full generation since Sir Henry Maine wrote these words. At the time they were written (1885) no man questioned their literal accuracy. For two hundred years after the Revolution of 1688 the English Constitution, despite all its baffling indistinctness of outline and all its perplexing anomalies of structure, afforded a model for political architects throughout a considerable portion of the civilized world. In most modern Constitutions there is an attempt to reproduce those features which were deemed to have given strength and stability to government in England : a Chief of the State, whether hereditary or elected, but in either case technically irresponsible and raised above the turmoil of political strife ; a bicameral Legislature, and an Executive responsible thereto. By all native eulogists from Milton to Burke, from Burke to Bagehot, from Bagehot to Maine, the genius of the English Constitution has been held to consist primarily in the exquisite proportion, the ‘ nice equipoise ’ of its various parts ; in the interaction and counteraction of the checks

and balances of a 'mixed constitution'. Foreign observers like Montesquieu and Boutmy have re-echoed the eulogy and reaffirmed the explanation.

Is the judgement of the world equally eulogistic to-day? Do Englishmen themselves preserve the simple faith professed by Milton and Maine? Or has the perfect balance been lost? Was the constitutional zenith passed before the close of the nineteenth century? It was the deliberate judgement of Mr. Lecky, philosopher-historian, that the world has never 'seen a better Constitution than England enjoyed between the Reform Bill of 1832 and the Reform Bill of 1867'.<sup>1</sup> Mr. Gladstone would seem to have shared this opinion: 'As a whole', he wrote in 1877, 'our level of public principle and public action were at their zenith in the twenty years or so which succeeded the Reform Act of 1832.'<sup>2</sup> Will later generations subscribe to these judgements or will their expression be ascribed to the waning enthusiasm that waits upon advancing years? Be this as it may—and the questions will recur—it is a fact not without significance that, alike among foreign observers and native commentators, there has been of late a marked change of tone and emphasis. The points selected for eulogy are not those which evoked enthusiasm from Bagehot and the generation which sat at his feet; doubts are plainly hinted; reservations cautiously made.

Is the  
Zenith  
passed?

Is the remarkable extension of the federal principle during the last half century in part responsible for some change of tone? Such guidance as England could offer was pre-eminently adopted to States organized upon her own unitarian lines. The complications of the Federal State have raised other problems and made fresh demands upon the ingenuity of Constitutional architects. Thus the Judiciary, as we have seen, has assumed an importance co-ordinate with that of the Legislature.

Federal-  
ism.

Has the extension of the sphere of foreign policy, the

Welt-  
politik

<sup>1</sup> *Democracy and Liberty*, i. 18.

<sup>2</sup> *Nineteenth Century*, November 1877.

development of *Weltpolitik*, produced parallel results ? Has the balance between the legislative and the executive functions been affected by the demand for a 'strong Executive' ?

Has the rapid emergence of economic and social problems, vital and insistent, tended to overshadow if not to obliterate the significance attaching to governmental forms and constitutional machinery ?

These are pertinent questions, but the attempt to answer them must be postponed.

The present chapter has been concerned exclusively with the evolution of parliamentary democracy in Great Britain ; it remains to show how the principles of Government first enunciated here have been applied to the young communities of British blood beyond the seas.

## VIII. THE EVOLUTION OF COLONIAL SELF-GOVERNMENT

'Regere imperio populos . . . pacisque imponere morem.'—VIRGIL.

'I have remarked again and again that a democracy cannot govern an Empire.'—PERICLES.

'The relation of a modern state to her highly developed colonies opens out a class of unprecedented facts demanding a class of political expedients equally unprecedented.'—SHELDON AMOS.

'We are not now to consider the policy of establishing representative government in the North American Colonies. That has been irrevocably done, and the experiment of depriving the people of their present constitutional power is not to be thought of. To conduct the government harmoniously in accordance with its established principles is now the business of its rulers. . . . The Crown must . . . submit to the necessary consequence of representative institutions ; and if it has to carry on the government in unison with a representative body it must consent to carry it on by means of those in whom that representative body has confidence.'—LORD DURHAM.

'We ought to look upon our colonies as integral portions of the British Empire, inhabited by men who ought to enjoy in their own localities all the rights and privileges that Englishmen do in England.'—SIR WILLIAM MOLESWORTH.

'The normal current of colonial history is perpetual assertion of the right to self-government.'—SIR CHARLES ADDERLEY (afterwards LORD NORTON) (1869).

IN the course of the centuries England solved for herself the problem of self-government. She has not, however, kept the solution as a monopoly of the homeland, but has freely offered it to her children oversea. All the British Dominions have now adopted, with such additions and modifications as their several circumstances appeared to require, the essential principles of parliamentary democracy. Some non-British Communities within the Empire have also, though more recently, put forward a claim that the same principles of government should be extended to them ; but with these demands we are not immediately concerned. The present chapter will trace the evolution of parliamentary democracy in the self-governing Dominions of the British Commonwealth.

Parliamentary Democracy in the Dominions



The main stages of evolution are common to all the Dominions. Canada, however, was the first to attain to the full height of parliamentary democracy, as she was also the first British colony to adopt the principle of Federalism. It will be convenient, therefore, in order to avoid tedious iteration, to illustrate the general law of constitutional development in the British Commonwealth by special reference to the particular case of Canada.

Stages in  
constitu-  
tional  
evolution

In their progress towards the goal of complete self-government the British Dominions have passed through the following stages :<sup>1</sup>

1. Military Government ;
2. Crown Colony Administration ;
3. Representative Government ;
4. Responsible Government ;
5. Federation or Union.

When Canada passed, by conquest, into the hands of Great Britain in 1760 it was a colony of Frenchmen ; its society was feudal in structure ; the people were habituated to the French law of the *ancien régime* and adhered to the Church of their fathers. Subject, in fact, to the military governor sent out from France the immediate rulers of the people were the seigneurs and the priests.<sup>2</sup>

(i) The  
*Règne  
militaire*  
in Canada

The first English rulers of Canada were, of course, soldiers, and their rule was confessedly admirable. The period from 1760 to 1764 is known as that of the *Règne militaire*, but of martial law in the technical sense there is no trace. The citizens of Montreal placed on record their gratitude to General Amherst, their conqueror and their first British Governor, who has 'behaved to us as a father rather than a conqueror'. The Peace of Paris, by which Canada was formally transferred to Great Britain, was signed in 1763, and in 1764 a Royal Proclamation was issued. 'So soon as the State and circumstances of the Colonies will admit thereof' the governors were to 'summon and call general assemblies within the said

<sup>1</sup> There have, of course, been varieties of detail.

<sup>2</sup> Cf. Parkman, *The Old Régime in Canada*.

Governments respectively, in such manner and form as is used in those colonies and provinces in America which are under our immediate Government.'

Fortunately, this Proclamation remained a dead letter and Canada continued to be governed much in the old manner to the satisfaction of the great mass of its inhabitants. The total population at the time of the Peace of Paris was about 65,000. Nearly all these people were French in blood, in speech, and in tradition, and Catholic in creed. After the Peace, however, a small knot of New England Puritans crossed the border and made mischief. They numbered, in 1766, less than 500 all told, but they attempted, happily without success, to induce the English Governors, under the pretext of establishing 'free' institutions, to put the French colonists politically and ecclesiastically under their heels.

Within ten years of the acquisition of Canada, and partly in consequence of it, Great Britain became involved in the quarrel with her own Colonies in North America. To that quarrel English statesmen had no desire to add another with French Canada, and in 1774 the *Quebec Act* was passed by the Imperial Parliament. This singularly sagacious piece of legislation must be set down to the credit of the much-abused government of Lord North. It had a twofold significance: on the one hand it secured the loyalty of French Canada at a moment of supreme crisis in the history of the Empire; on the other, it registered an important stage in the evolution of colonial self-government.

(ii) The  
*Quebec*  
*Act, 1774*

The *Quebec Act* began by revoking the Proclamation of 1764 as 'inapplicable to the state and circumstances of the said province, the inhabitants whereof amounted at the conquest to about 65,000 persons professing the religion of the Church of Rome'. To that Church it proceeded to secure a recognized legal position. The people, subject to the taking of a simple oath of allegiance, were to be protected in the exercise of their religion, and their clergy were to 'hold, receive, and enjoy their accus-

tomed rights and dues with respect to such persons only as shall profess the said religion'. In civil cases French law was to be maintained; but in criminal cases English procedure was to be followed by reason of its 'certainty and lenity'. Finally (and it is this which gives the Act its constitutional significance), a Legislative Council consisting of not less than seventeen nor more than twenty-three members was to be appointed by the Crown with power to make ordinances, but not to impose taxation. The Act gave great umbrage to the New England Puritans, but corresponding satisfaction in Canada; and, largely as a result of it, French Canada, throughout all the troubles with the American Colonies, not only remained loyal to the British connexion, but co-operated heartily with the imperial troops in repelling American attacks on Canada.

Quebec  
and  
Ontario

The recognition of American independence in 1783 opened a new epoch in the history of Canada, and led directly to a fresh constitutional development. After the Peace of Versailles, large numbers of American loyalists to whom the independent States no longer afforded a home found their way over the borders into Canada. Reinforced by emigrants from the mother-country they brought a new element into the political and social life of the colony. The ultimate effect of the introduction of this new strain was in the highest degree stimulating and salutary; but the immediate consequences were not devoid of embarrassment. Under one Governor and one Council; under one code of laws and one constitutional system, there were now combined two peoples—the one French in race and tradition and Roman Catholic in Creed; the other British in blood and Protestant in religion. Before long acute friction arose between them. Pitt realized the gravity of the situation, and in 1791 he introduced and passed into law the *Constitutional Act*.

(iii) The  
*Constitutional Act*,  
1791

The enactment of this statute marks the beginning of the third stage in the constitutional evolution of Canada. The *Règne militaire*, virtually though not technically

prolonged until 1774, gave place to the administration of a Governor and nominated Council as prescribed by the *Quebec Act*. The nominated Council was now to be superseded or rather to be supplemented by an elective House of Representatives.

Under the *Constitutional Act* of 1791 Canada was divided into two Colonies: the one, Quebec, was to consist, speaking broadly, of French Roman Catholics; the other, Ottawa, of English Protestants. In each Colony there was to be a Governor, assisted by an executive council and a bicameral legislature: a council of nominees and an elected House of Representatives. In each colony land was set apart for the endowment of the dominant Church. For a time all went well; Pitt's hopes were realized, and in the war of 1812 the Canadians of both races demonstrated their loyalty to Great Britain not less effectively than in the war of American independence.

But in the eyes of men bred in English traditions, the Constitution of 1791 had one cardinal defect: the Legislature had no real control over the Executive. Representative without Responsible Government was, in Charles Buller's striking phrase, like a fire without a chimney. True, the makers of the Federal Constitution of the United States had set no store by the fruits of the victory won by their Puritan ancestors over the Stuart kings. But the Canadians, French and English alike, regarded the matter differently, and it was this defect, combined with fiscal and ecclesiastical difficulties, which led to the breakdown of the Constitution of 1791.

In Lower Canada, in particular, there was in the late thirties prolonged conflict between the Assembly and the Executive.<sup>1</sup> 'Having no influence in the choice of any public functionary, no power to procure the removal

<sup>1</sup> It should be observed that Lord Durham does not lay exclusive emphasis on the constitutional difficulty. Cf., e. g., p. 16 (ed. Lucas), 'I expected to find a contest between a government and a people: I found two nations warring in the bosom of a single state: I found a struggle not of principles but of races.'

of such as were obnoxious to it merely on political grounds, and seeing almost every office in the Colony filled by persons in whom it had no confidence,' the Assembly ' had recourse to that *ultima ratio* of representative power to which the more prudent forbearance of the Crown has never driven the House of Commons in England, and endeavoured to disable the whole machinery of Government by a general refusal of the supplies'.<sup>1</sup> In Upper Canada the same root difficulty existed, but, not being complicated by racial differences, it presented itself in a less accentuated form.

The Re-  
bellions of  
1837

Led by a young Frenchman, Louis J. Papineau, a vain and self-seeking rhetorician, the French party in Lower Canada raised the standard of independence (1837). A party in Upper Canada led by William Lyon Mackenzie followed suit. In both colonies the rebellion was ultimately suppressed without difficulty, but not before it had compelled the attention of the Home Government to the menacing condition of affairs in British North America. Hitherto the English Ministry had been disposed to minimize its significance. Early in 1838, however, they decided to suspend the Canadian Constitution and to send out Lord Durham as High Commissioner.

Lord  
Durham's  
Mission  
and  
Report

From a personal point of view Durham's mission to Canada was a fiasco ; but the *Report* in which he embodied his views of the problem and prescribed remedies for its solution is perhaps the most valuable state paper ever penned in reference to Colonial self-government. Lord Durham recommended the union of the two Canadas ; an increase in the numbers of the Legislative Councils ; a Civil List for the support of the officials ; a reform of municipal government, and, above all, the recognition of the principle of the responsibility of the Colonial Executive to the Colonial Legislature. ' We are not now to consider the policy of establishing representative Government in the North American Colonies. That has been

<sup>1</sup> Lord Durham, *Report on Canada*, p. 81 (ed. Lucas) ; cf. also pp. 73, 75, and 77.

irrevocably done . . . the Crown must consent to carry on the Government by means of those in whom the representative body has confidence.' <sup>1</sup> And again :

' The responsibility to the United Legislature of all officers of the Government, except the Governor and his Secretary, should be secured by every means known to the British Constitution. The Governor . . . should be instructed that he must carry on his Government by heads of departments in whom the United Legislature shall repose confidence ; and that he must look for no support from home in any contest with the legislature, except on points involving strictly Imperial interests.' <sup>2</sup>

Lord Durham's *Report* is rightly regarded as the Magna Carta of Colonial self-government. The Home Government accepted, frankly and unreservedly, the principles it enunciated, and made it the basis of their policy. But, unfortunately for himself, Durham was less circumspect in action than sagacious in counsel. He had hardly set foot in Canada (May 1838) before he outraged local feeling by the appointment of new and untried men to his Executive Council. That there was something to be said for a fresh start, for a council ' free from the influence of all local cabals ' is undeniable ; and Charles Buller has said it well.<sup>3</sup> The proceeding was not in excess of the dictatorial powers with which Lord Durham was endowed ; but that three out of four Councillors should be his own private Secretaries was regarded as an abuse of them. Yet worse was to come. On 28 June the Dictator issued an Ordinance, proclaiming an amnesty for all who had taken part in the late rebellion, with twenty-three exceptions. Of these, eight, who had pleaded guilty of high treason, were exiled to Bermuda, and fifteen others, including Papineau, who had fled from Canada, were forbidden to return to it on pain of death. A loud outcry against these high-handed proceedings arose both in the Colony and at home. The deportation of criminals to

<sup>1</sup> *Op. cit.*, p. 278.

<sup>2</sup> *Ibid.*, p. 327.

<sup>3</sup> See Buller's *Sketch*, *op. cit.*, p. 343.

Bermuda was illegal, and the Imperial Government, therefore, decided to disallow the Ordinance, though they accepted a Bill to indemnify the author of it. Lord Melbourne was aghast at Lord Durham's indiscretion. 'His conduct', he wrote to the Queen, 'has been most unaccountable. But to censure him now would either be to cause his resignation, which would produce great embarrassment, and might produce great evil, or to weaken his authority, which is evidently most undesirable'.<sup>1</sup> Durham was deeply hurt at the disallowance of the Ordinance, and in the Proclamation announcing its disallowance he justified his own conduct and censured that of the Ministry at home. Having thus added to his original indiscretion he determined to resign. On 1 November 1838 he left Canada, and on landing at Plymouth he boasted that he had 'effaced the remains of a disastrous rebellion'. As a matter of fact there was some recrudescence of insurrection in both Provinces immediately after his departure, but Sir John Colborne suppressed it with the loss of forty-five British soldiers, killed and wounded.

The  
Canadian  
Union  
Act, 1840

The *Durham Report* was published in 1839, and the Government, both in administration and legislation, acted forthwith upon its recommendations. To Poulett Thomson (Lord Sydenham), who succeeded Lord Durham as Governor, Lord John Russell wrote thus: 'Your Excellency . . . must be aware that there is no surer way of earning the approbation of the Queen than by maintaining the harmony of the Executive with the legislative authorities.' In 1840 the Union Act was passed. It provided for the union of Ontario and Quebec; for a parliament of two chambers; a Legislative Council of not fewer than twenty persons nominated by the Crown for life; and an elected House of Assembly in which each province was to be equally represented by forty-two members; and for a Civil List. Of the responsibility of the Executive there was, curiously enough, no mention. The

<sup>1</sup> *Letters of Queen Victoria*, i. 163.

English practice was implicitly presupposed, but not until the governorship of Lord Elgin, 1847-54, was the principle explicitly affirmed.

Meanwhile Lord Durham's brilliant but erratic career had been closed in 1840 by death. Lord Melbourne declared that he 'was raised, one hardly knows how, into something of a factitious importance by his own extreme opinions, by the panegyrics of those who thought he would serve them as an instrument, and by the management of the Press'. The principal author of the Reform Bill of 1832 and of the *Canadian Report*<sup>1</sup> of 1839, whatever his obvious failings, can hardly be so lightly dismissed.

An early Victorian statesman could hardly be expected to realize that the Durham mission to Canada—primarily suggested by a desire to be rid of an inconvenient colleague—would be accounted by posterity as the most significant single event in the two administrations of Lord Melbourne; but thus does the efflux of time alter the perspective and confound contemporary values.

The first Parliament of United Canada met at Kingston on 14 June 1841, but it was, as we have seen, some years before the Canadian Constitution was infused with the spirit of the Durham *Report*. To the successful working of the Cabinet system many things are essential; not least, organized and coherent parties. Lord Sydenham, habituated to the party system in England, was reduced to despair by the lack of it in Canada. He found the House of Assembly 'split into half a dozen different parties, the Government having none and no one man to depend on'. 'Think of a House', he wrote, 'where there is no one to defend the Government when attacked or to state the opinion and views of the Governor.' Canada, it was plain, could not be initiated into all the mysteries of the Cabinet system without a period of apprenticeship. Lord Sydenham was compelled himself to undertake the

United  
Canada

<sup>1</sup> This is not the place for a discussion of the difficult question of the authorship of this Durham *Report*. 'Wakefield thought it, Buller wrote it, Durham signed it—' represents one estimate. Cf. Reid's *Lord Durham*.



tuition ; to act in the dual capacity of constitutional monarch and parliamentary Prime Minister. In this exacting role he displayed both energy and tact, and at the end of two years he was able to report to Lord John Russell that the objects of his mission had been successfully accomplished. 'The union of the two Canadas is fully perfected, and the measures incidental to that great change have been successfully carried into effect . . . and the future harmonious working of the Constitution is, I have every reason to believe, secured.'

Respon-  
sible  
Govern-  
ment

Lord Sydenham unquestionably achieved a great personal success, but his complacency as to the Constitution was premature. After his sudden death in 1841 there was a period of parliamentary turmoil which was temporarily stilled by the concessions made to the 'opposition' by Sir Charles Bagot (1841-3), but blazed up again under Bagot's successor, Lord Metcalfe. Metcalfe, however, died prematurely in 1846, and in 1847 was succeeded by Lord Elgin, who was sent out with specific orders to carry into effect, promptly and unreservedly, the policy recommended in the *Report* of his father-in-law, Lord Durham. The new Governor was formally instructed by the Colonial Office 'to act generally on the advice of the Executive Council, and to receive as members of that body those persons who might be pointed out to him as entitled to be so by their possessing the confidence of the Assembly'. Thus was the central doctrine of Lord Durham's *Report* definitely and finally accepted as the ruling principle of Canadian Government. Responsible Government was introduced into New Brunswick and Nova Scotia in 1847, and four years later into Prince Edward Island. It has since been extended to all the more important Colonies in the British Empire.

The  
Problem

Meanwhile, Canada entered upon a period of rapid development, economic and social ; yet, constitutionally, all was not well with her. Not many years passed before it became obvious that neither the union of the two Canadas nor the attainment of responsible government

was destined to register the final stage in the constitutional evolution of British North America. 'Self-government' had been attained. To all intents and purposes the subjects of the Crown in Canada were as 'free' as the subjects of the Crown in the United Kingdom. That the concession was in itself wise no one will be disposed to deny. 'I cannot conceive', said Disraeli, speaking at the Crystal Palace in 1872, 'how our distant colonies can have their affairs administered except by self-government.' But ought the concession to have stood alone? Was it not the part of prudent statesmanship to have taken the opportunity of readjusting the constitutional relations of the Empire as a whole? Disraeli answered this question with an emphatic affirmative, in a passage which deserves to be rescued from oblivion :

'Self-government, in my opinion, when it was conceded ought to have been conceded as part of a great policy of imperial consolidation. It ought to have been accompanied with an imperial tariff, by securities for the people of England for the enjoyment of the unappropriated lands which belonged to the sovereign as their trustee, and by a military code which should have precisely defined the means and the responsibilities by which the colonies should be defended, and by which, if necessary, this country should call for aid from the colonies themselves. It ought, further, to have been accompanied by some representative council in the metropolis which would have brought the colonies into constant and continuous relations with the home Government. All this, however, was omitted because those who advised that policy—and I believe their convictions were sincere—looked upon the colonies of England, looked even upon our connexion with India, as a burden on this country, viewing everything in a financial aspect, and totally passing by those moral and political considerations which make nations great and by the influence of which alone men are distinguished from animals.' <sup>1</sup>

Meanwhile, a constitutional change of the highest significance alike to Canada and to the Empire at large

Centrifugal tendencies in Canada

<sup>1</sup> *Speeches of Lord Beaconsfield*, ed. Kebbel, vol. ii, pp. 530-1.

had taken place in British North America. Responsible Government, clogged with the condition of union between the two Canadas, had been working none too well. The fault lay indeed rather with the principle of union than with that of a parliamentary Executive. For the infelicity of the union two causes were mainly responsible. On the one hand, there was obviously much in common between the disunited British Colonies: Newfoundland, Nova Scotia, Prince Edward Island; and more particularly between New Brunswick and Upper Canada; on the other hand, there were many elements of disunion between the united Colonies of Upper and Lower Canada. The latter were as a candid historian puts it 'obviously ill-matched yokefellows'.<sup>1</sup> Lord Durham had perceived the fact twenty years earlier. But he found in it an argument not for federation but for union. 'The French', wrote Lord Durham, 'remain an old and stationary Society in a new and progressive world. In all essentials they are still French; but French in every respect dissimilar to those of France in the present day. They resemble rather the French of the Provinces under the old regime'.<sup>2</sup> But while Quebec was rigidly conservative, not to say reactionary, Ontario was, both in a political and economic sense, eminently progressive. Ontario was anxious to attract population; the French Canadians, though themselves prolific, were fearful of losing their identity, and discouraged immigration. Consequently the balance of population between the two Provinces rapidly shifted. Quebec in 1841 numbered 691,000 people, Ontario could claim only 465,000; by 1861 the latter had increased to 1,396,000; the former only to 1,111,000.<sup>3</sup> Race, religion, and tradition all combined to keep apart two peoples who had never really united.

The Mari-  
time Pro-  
vinces

Among the Maritime Provinces there was, on the contrary, a strong movement towards closer union, and

<sup>1</sup> Greswell, *Canada*, p. 194.

<sup>2</sup> Durham, *Report*, vol. ii, p. 31 (ed. 1912, Clarendon Press).

<sup>3</sup> Greswell, *op. cit.*, p. 194.

in 1864 the Legislatures of Nova Scotia, Prince Edward Island, and New Brunswick agreed to hold a Convention for the purpose of discussing the project. Meanwhile, in Canada, a constitutional deadlock had been solved only by the formation in June 1864 of a coalition Ministry pledged 'to address itself in the most earnest manner to the negotiation for a confederation of all the British North American Provinces'. In pursuance of this pledge the Canadian Government sought and obtained permission to send delegates to the Convention called by the Maritime Provinces.

The Convention met at Charlottetown on 1 September. The project of the larger federation rapidly took shape, and, in October, a second Convention assembled at Quebec. Before the month was out the Delegates had agreed upon seventy-two resolutions, which formed the basis of the subsequent Act of Federation.<sup>1</sup> Alexander Galt, George Brown, and George Étienne Cartier must share with John A. Macdonald the credit of this remarkable achievement; but to Macdonald it belongs in pre-eminent degree. He himself would have preferred to go even farther; believing that 'if we could agree to have one Government and one Parliament, legislating for the whole of these peoples, it would be the best, the cheapest, the most vigorous, and the strongest system of Government we could adopt'. But he realized that his own ideal was unattainable. Neither Lower Canada nor the Maritime Provinces were willing to surrender their individuality; they were prepared for union but not for unity, and Macdonald expressed his belief that in the Resolutions they had 'hit upon the happy medium', and had devised a scheme which would give them 'the strength of a legislative Union, and the sectional freedom of a Federal Union, with protection to local interests'.

Project of  
Federation

Many difficulties were encountered, many jealousies had to be appeased, but the scheme was eventually

<sup>1</sup> Cf. Egerton, *Federations and Unions in the British Empire*, pp. 27 seq.

approved by the two Canadas, Nova Scotia, and New Brunswick. In December 1866 delegates from these Colonies met under the Presidency of Lord Carnarvon—then Colonial Secretary—in London. A Bill embodying the details agreed upon in this Conference was submitted to the Imperial Parliament; on 29 March 1867 the British North America Act received the Royal Assent; and on 1 July of the same year it came into operation.

The details of the new Constitution thus enacted for British North America will, later on, demand close scrutiny. Before proceeding to that analysis it may, however, be convenient to take a rapid survey of the main stages by which the other Dominions reached a similar point of development. The stages are so closely parallel with those already indicated in the case of Canada as to dispense with the necessity for detailed exposition.

#### Australia

New South Wales, the parent of most of the Australian Colonies, was rediscovered by Cook in 1770. But for the loss of the original thirteen colonies in America Cook's discovery might have been neglected for years; but after 1783 the Carolinas refused, very naturally, to receive English convicts any longer, and in 1787 the British Government decided to utilize New South Wales as a penal settlement. For thirty years it was little else; but in 1813 the pressure of drought led to the exploration of the Blue Mountains. It was discovered that New South Wales offered incomparable facilities for sheep grazing, and in 1821 the colony was opened to free immigrants. For a time the Free Settlers and the 'Emancipists' lived side by side; but in 1840 the transportation of convicts was forbidden by an Order-in-Council, and New South Wales was quickly transformed from a penal settlement into a land of freemen.

This change, combined with the fact that in the same year Canada was endowed with the privilege of responsible government, naturally aroused a desire for a change of system in Australia. Hitherto the Colony had been governed under strict military law, and even so the task

of government, as may be imagined, was difficult enough. But in 1842 a Legislative Council, consisting of twelve nominated and twenty-four elected members, was established. This did not long satisfy the aspirations stimulated by the example of Canada, and in 1850 an Act was passed by the Imperial Parliament which gave to the several Australian Colonies general powers to settle for themselves the exact form of their Constitutions. They quickly acted on the permission, and in this way the parent colony of New South Wales, with its offshoots Victoria, Tasmania, and South Australia, attained in 1855 to the dignity of responsible government. Queensland, another offshoot of New South Wales, was entrusted with responsible government from its first establishment as an independent colony in 1859. New Zealand attained to the same dignity in 1856, and Western Australia in 1890. In each of these colonies there is now a Governor, representing the Crown, a Legislature of two Houses, and a Cabinet responsible to the Legislature. In New South Wales and Queensland, as well as in New Zealand, members of the Second Chamber or Legislative Council are nominated for life by the Governor, virtually by the Ministry, without limit of numbers.<sup>1</sup> In the other colonies they are elected.

In the Australasian Colonies the problem of self-government, thanks to the racial homogeneity of the white population, presented fewer difficulties even than in Canada. In South Africa it was vastly more complicated.

South  
Africa

Of the South African Colonies, the original nucleus was the Cape Colony. Had James I been less timid and the English East India Company more amply endowed, the Cape Colony might have been a British possession from the first. Occupied by two adventurous Englishmen in 1620, it was declined by James I, and in 1652 was occupied by the Dutch East India Company, which administered it from Batavia until the close of the eighteenth century. When, in 1795 the United Netherlands was conquered by

<sup>1</sup> In Queensland the Second Chamber—the Legislative Council—was abolished in 1922.

France, the Dutch Stadtholder begged the English Government to occupy the Cape Colony. The Government complied, but on the conclusion of peace (1802) handed the colony back to the Batavian Republic. Reoccupied in 1806, it was retained by England until the conclusion of peace in 1814, when it was purchased from the Netherlands for £6,000,000 sterling and formally annexed by Great Britain.

The white inhabitants were, however, predominantly Dutch, and not until after 1820 was there any considerable English immigration. Between the English immigrants and the Dutch inhabitants friction quickly ensued, and in 1836-40 large numbers of the Dutch farmers trekked into the lands north of the Orange River and the Vaal, and thus there came into existence the Orange Free State and the Transvaal.

Meanwhile in 1824 a handful of English colonists established themselves at Port Natal, and after many vicissitudes Natal was finally proclaimed to be a British colony in 1843. Until 1856 it formed part of Cape Colony, but in that year it was established as an independent colony, and in 1893 attained to the dignity of 'responsible' government. Cape Colony had reached the same stage in 1872. The Transvaal and the Orange Free State, having been finally annexed by Great Britain in 1902, were endowed with responsible government in 1906 and 1907 respectively.

Dominions and Colonies

Such, in brief outline, was the process by which the Oversea Dominions attained to 'responsible' government. Thus far self-government in the full sense has been attained only by the Dominion of Canada, Newfoundland, the six States now united in the Commonwealth of Australia, New Zealand, and the four colonies now merged in the Union of South Africa. Other colonies such as Bermuda and Barbados are in the intermediate stage, possessing an elective Legislature without a responsible Executive. This system, though useful as a temporary and disciplinary device, is full of pitfalls and

tends neither to harmony between the Governor, responsible to Whitehall, and the Legislature, responsible to a local electorate; nor to goodwill between the Colonial and the Imperial Government. This intermediate type is apt, therefore, either, as in the case of the Dominions, to develop by a natural evolutionary process into the higher form of 'responsible' government, or to give place, as in Jamaica, to Crown Colony administration, that is, to the autocratic rule of the Colonial Office in Whitehall.

The 'responsibility' even of the self-governing Dominions is not, however, without limitations. Virtually complete as regards internal government and domestic administration, it does not extend to the control of external relations or to the conduct of foreign affairs. Nor does self-government imply entire independence of the Imperial Parliament, still less of the Imperial Executive, nor even of the Imperial Judicature.

On the contrary the King-in-Parliament is legally Sovereign not only in the United Kingdom but throughout the Empire. In theory, Parliament is competent to legislate for Canada or New Zealand precisely as it can for Jamaica, Scotland, or Wales. In practice it does legislate to a considerable extent to secure objects which are common to the Empire as a whole, but which are beyond the competence of any given Colonial Legislature. A long series of Acts relating to merchant shipping affords a good instance of this. The Imperial Parliament, again, is a constituent Legislature for the Empire; the existing Constitutions of Canada, Australia, and South Africa are all based upon the Statute Law of the United Kingdom. Or, again, the Imperial Parliament intervenes to validate doubtful Acts passed by Colonial Legislatures.<sup>1</sup> The legislative authority of the Imperial Parliament is, therefore, a reality, albeit within a limited sphere.

Nor is the Crown, acting, of course, on the advice of the Secretary of State, bereft of all power in regard to the domestic legislation even of the self-governing Dominions.

<sup>1</sup> Cf. on this subject Keith, *Responsible Government*, pp. 176-221.



The supremacy of the Crown is exercised in several ways. Of these, two are particularly important: the King may veto or disallow any Act passed by a Colonial Legislature, even though it has received the assent of his representative—the Governor; or he may instruct the Governor to reserve for the Royal considerations Statutes passed by the Colonial Legislatures. Such intervention naturally tends to become rarer, but between 1836 and 1864 no fewer than 341 Bills were, under Royal instructions, reserved for the consideration of the Crown in the North American Colonies alone, and, of these, 47 never received the Royal Assent.<sup>1</sup>

The right of reservation was expressly recognized in the Acts or Ordinances which established 'responsible' government in the six Australian Colonies, in New Zealand, and in the South African Colonies; and it reappears in the Act for the Union of South Africa as it did in the British North America Act. The terms of the Australian Commonwealth Act are less explicit on the subject; but in the Commonwealth, as elsewhere, the right of the Crown is unquestioned.

As a method of procedure, reservation is plainly preferable to disallowance, but the latter power is expressly conferred upon the Crown in the *British North America Act*, the *Commonwealth of Australia Act*, and in the Constitutions of New Zealand, the six Australian States, and the Union of South Africa.<sup>2</sup>

The control of the Crown over legislation is exercised mainly in relation to such matters as the treatment of native races; the immigration of coloured peoples; treaty relations; trade and currency; merchant shipping; copyright; divorce and status; military and naval defence; questions affecting the interests of British subjects not resident in the Dominions, and all matters affecting the prerogative of the Crown.<sup>3</sup>

<sup>1</sup> Keith, *op. cit.*, p. 3.

<sup>2</sup> Keith, *Responsible Government in the Dominions*, ii. 1018-19, and on the whole subject cf. the same admirable work, vol. ii, Part V, *passim*.

<sup>3</sup> *Ibid.* ii. 1020.

As regards domestic administration in the Dominions, the control of the Crown, exercised through the Governor, is of the slightest, though it has been occasionally exerted, on Imperial grounds, as for instance when Sir William MacGregor was compelled in 1907 to take steps for the publication of the Imperial Order-in-Council in regard to the fisheries in Newfoundland, despite the refusal of his Prime Minister to publish it.

In the domain of foreign policy the Crown occupies a position of supreme and sole authority. The part played by the Dominions in the world-war and their participation in the negotiations for peace may necessitate a modification of this statement in the near future. The problems raised by recent events will, however, be discussed in a subsequent chapter;<sup>1</sup> for the present it must suffice to lay down certain broad propositions, the technical validity of which is not in question.

✓ The right of declaring war and of concluding peace is vested in the Crown, and is exercised by the Crown for the Empire as a whole, and for every portion of it. No Dominion or other unit within the Empire could declare its neutrality in a war made by or against Great Britain, nor contract out of the liabilities or obligations entailed by such a war. How far, if at all, any particular Dominion should or should not actively participate in the war, and the extent of its contribution in men or money, are in practice matters within its own control. Still, as regards } war and peace, the Empire is a unity, speaking with one } voice and acting as a single whole.<sup>2</sup>

The position of the Dominions in regard to the treaty-making power is less free from ambiguity. Even political treaties, much more commercial treaties, are on the border line between Executive and Legislative Acts, since their execution frequently, though not invariably, involves legislation. But though the position as regards treaties

<sup>1</sup> *Infra*, cc. xi and xii.

<sup>2</sup> In view of the fact (cf. *infra*, cc. xi and xii) that the signature of the Dominion Representative was attached to the Treaty of Versailles in a dual capacity, this statement may be questioned.

(ii) Domestic  
adminis-  
tration

(iii) Ex-  
ternal  
affairs

✓ Treaty-  
making  
power

is in detail both difficult and delicate, certain broad propositions may with some assurance be laid down.

The making of treaties with foreign States is an absolute prerogative of the Imperial Crown. 'There is', says Dr. Keith, 'no case yet known in which any treaty proper has been made without the consent of the Imperial Government.' Nor is it open to doubt that treaties made by the Crown are technically binding upon the Colonies 'whether or not the Colonies assent to them. At the same time the convention is now established that, as far as possible, no treaty obligations shall be imposed on any self-governing Dominion without its own assent.

This question was raised in an acute form so far back as 1885. The recent activity of Germany in the Pacific, and the acquiescence of the Imperial Government in the annexation of parts of New Guinea and the Samoan islands by the latest comer in the Colonial field, aroused alarm in Australia and New Zealand. Mr. (afterwards Sir James) Service, at that time Premier of Victoria, gave vigorous expression to the feelings aroused by the complaisant policy of the Home Government. He pointed to 'the very anomalous position which these colonies occupy as regards respectively local government and the exercise of Imperial authority'; he argued, not unreasonably, that 'the weakness of this position has at times been most disadvantageously apparent and its humiliation keenly felt', and he insisted that Colonial interests were sufficiently important to entitle the Colonies 'to some defined position in the Imperial Economy'.

Echoes of this unfortunate controversy were not unnaturally heard when, for the first time, a Colonial Conference assembled in London in 1887. The Conference of 1902 went beyond the point of criticism and cautiously but distinctly affirmed the principle that the Colonies had a right to be consulted in regard to the terms of treaties in which they were specially concerned, if not technically to co-operate in the conclusion of those treaties. A resolution was indeed actually accepted that 'so far as may be

consistent with the confidential negotiation of treaties with foreign Powers, the views of the Colonies affected should be obtained in order that they may be in a better position to give adhesion to such treaties'.

The difficulty was not, however, satisfactorily solved, and the proceedings of the Conference of 1907 were chiefly memorable for Mr. Deakin's grave indictment of the policy pursued by the Imperial Government in regard to Pacific problems. With curious indifference to Colonial sentiment the Imperial Government had, in 1906, concluded a Convention with France in reference to the New Hebrides. The people of Australia and New Zealand held the view, and strongly expressed it, that but for the 'inaction' of the Home Government the difficulty should never have arisen, and consequently that it was for them to discover a solution acceptable to the Dominions.

Similar protests have from time to time been made by the Dominion of Canada in reference to treaties concluded between the Imperial Government and the United States and France. As a result, it has now become an established convention that, even in regard to political treaties, Dominion Governments shall be consulted wherever their interests are involved; though the rule remains absolute that the conclusion of such treaties is the absolute and exclusive prerogative of the Crown, acting on the advice of the Imperial Government.

Commercial treaties stand in a somewhat different category. The right of the self-governing Colonies to frame their own tariffs seemed to involve the right to conclude separate commercial agreements with foreign Powers. A step in this direction was taken when in 1877 it was agreed that commercial treaties, concluded by the Imperial Government, should not be automatically applicable to the self-governing Colonies, but that the latter should be given the option of adhering to them within a specified period. In 1884 a further stage was reached: Sir Charles Tupper, as High Commissioner, obtained for Canada the right to negotiate commercial

Com-  
mercial  
Treaties

treaties with Spain,<sup>1</sup> and in 1893 he signed, along with Her Majesty's representative, a treaty which he had himself negotiated with France.<sup>2</sup> The principle, however, was carefully preserved that by whomsoever the negotiations are conducted the diplomatic representative of the Imperial Government must be the plenipotentiary for the signature of the treaty, even though a representative of the Colonial Government concerned be associated with him.

'To give the Colonies the power of negotiating treaties for themselves without reference to Her Majesty's Government would be to give them an international status as separate and Sovereign States and would be equivalent to breaking up the Empire into a number of independent States, a result which Her Majesty's Government are satisfied would be injurious equally to the Colonies and to the Mother Country and would be desired by neither.'<sup>3</sup>

Thus did Lord Ripon, as Secretary of State, define, in 1895, the constitutional position. That position has never been explicitly questioned; but there has been, in the last twenty-five years, an increasing and not unnatural disposition on the part of individual Dominions, and in particular of Canada, to negotiate directly in commercial matters with foreign States. Such negotiations, issuing in 'conventions' and 'agreements', have not, however, contravened the principle affirmed in Lord Ripon's Dispatch, nor impugned the prerogative of the Crown.

How far the new status claimed by and conceded to the Dominions in the Peace Treaty negotiations at Paris, and in the Covenant of the League of Nations, will necessitate a modification of the established principle is a serious question; but it must not at this stage detain us.

Responsible Government not the final goal

The evolution of Colonial self-government was beyond question one of the most significant among the political

<sup>1</sup> Tupper, *Recollections*, quoted *ap. Duncan Hall, op. cit.*, p. 84.

<sup>2</sup> Keith, *op. cit.*, p. 1115.

<sup>3</sup> Cd. 7824, p. 15.

movements of the nineteenth century. But responsible government was not the final goal. Seven States in British North America, seven in Australasia, four in South Africa—each entirely independent of the other, but each forming a unit in the great Sea-Commonwealth—this could not be the term of evolution. The mid-Victorian statesmen, as we have seen, regarded 'self-government' as the prelude to independence. In the Colonies themselves there was no such articulate ambition. The problem of immediate interest to them was not how to achieve independence of the motherland, but how to attain some species of union between the units of the several groups, American, Australian, and African.

As regards North America, this statement of the problem requires some modification. The movement was indeed predominantly centripetal, but it was in part centrifugal. The Maritime Provinces desired union among themselves; they were anxious also to unite with Ontario and Quebec; but Ontario and Quebec were mainly anxious for the dissolution of the bond which had united them since 1840. The progress of this complicated development has been already indicated.

In British  
North  
America

In Australia the problem was relatively simple. Until the eighties the Australian Colonies had no such external incentive to unity as was afforded to British North America by the presence of a powerful and none too friendly neighbour. But when the external stimulus was applied there were, as we shall see, fewer internal difficulties to be overcome, though there were not lacking the causes of friction common between kinsmen and neighbours.

In Aus-  
tralia

The racial homogeneity which was the outstanding characteristic of the Australian Colonies was conspicuously absent in South Africa. From the outset the relations between Boers and Britons left much to be desired, and time served only to embitter them. But there was one impulse to union between them at once more persistent and more powerful than any which operated either

In South  
Africa

in Canada or in Australia ; the two white races, even when combined, constituted a minority, numerically contemptible, in the face of the strong and warlike races native to South Africa. Nor were other motives to union lacking.

To a consideration of these matters we shall proceed in the next chapter.

## IX. COLONIAL FEDERALISM

### *British North America and Australia*

'The Canadian Constitution is from the federal point of view the best constitutional arrangement yet devised.'—F. S. OLIVER.

'The English have perhaps been more fortunate in Australasia than in any other part of the globe. They have here found a vast extent open for settlement, with a climate and geographical position well suited for the work; and though England had no right of prior discovery, and attempted no colonization in this quarter of the world till very recent years, she has been left to go her way unchecked by foreign interference or, except in New Zealand, by native wars, and has been allowed to develop this most valuable part of her empire in comparative quiet and peace.'—SIR C. P. LUCAS.

'The Constitution of the Australian Commonwealth . . . is an adaptation of the principles of British and Colonial Government to the federal system. Its language and ideas are drawn, partly from the model of all Governments of the British Constitution itself; partly from the Colonial Constitutions based on the British model; partly from the Federal Constitution of the United States of America, and partly from the Semi-federal Constitution of the Dominion of Canada; with such modifications as were suggested by the circumstances and needs of the Australian people.'—QUICK and GARRAN.

AS in the movement towards self-government, so in that towards federation, the colonies of British North America led the way. The diverse causes which contributed to render those colonies dissatisfied with the unitary system devised in 1840 have been analysed in the preceding chapter, and we may, therefore, proceed to examine the constitutional provisions which were embodied in the *British North America Act, 1867*.

*The British North America Act, 1867*

The Act, which came into force on 1 July, opens with a preamble the wording of which has evoked the caustic criticism of a distinguished jurist. 'Whereas', it runs, 'the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom', &c.



Professor Dicey denounces the last words as an instance of 'official mendacity' and suggests that, in order to be accurate, the word *States* should be substituted for *Kingdom*.<sup>1</sup> But the critic would seem, in this case, himself to be in error. Plainly the 'principle' to which reference is intended is not that of federalism but that of a parliamentary executive in regard to which the Canadian Constitution follows the example not of the United *States* but of the United *Kingdom*. The point is placed beyond doubt by a subsequent paragraph of the Preamble: 'and whereas . . . it is expedient not only that the Constitution of the Legislative authority in the Dominion is provided for but also that *the nature of the Executive Government* therein be declared . . .' These words render it clear that the intention of the Legislators was that the constitutional conventions, attained, after long centuries of evolution, in the unwritten constitution of the mother-country, should be presupposed in the statutory Instrument devised for the daughter-land.

The  
Executive

The Executive power was 'to continue and be vested in the Queen, and in the heirs and successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland'. On this point Sir John Macdonald laid great stress. 'With the universal approval of the people of this country we have provided that for all time to come, so far as we can legislate for the future, we shall have as head of the Executive power the Sovereign of Great Britain.' His hope was in this way to avoid 'one defect inherent in the Constitution of the United States. By the election of the President by a majority and for a short period he never is the Sovereign and chief of the nation. . . . He is at best but the successful leader of a party. . . . I believe that it is of the utmost importance to have that principle recognized, so that we shall have a Sovereign who is placed above the region of party—to whom all parties look up—who is not elevated by the action of one party, nor depressed by the action of another, who is the common head and Sovereign of all.'

<sup>1</sup> *Law of the Constitution*, 2nd ed., p. 153.

The Sovereign of Great Britain was to be represented in the Dominion by a Governor-General, who was to have the ordinary powers of a 'Constitutional' Sovereign in the English sense: the command-in-chief of the armed forces of the Crown, and the right to appoint and, if necessary, to remove the Lieutenant-Governors of the Provinces of the Dominion. He was to be aided and advised by the Queen's Privy Council of Canada, and the Instrument (§ II) further provides that 'the persons who are to be members of that Council shall be from time to time chosen and summoned by the Governor-General and sworn in as Privy Councillors, and members thereof may be from time to time removed by the Governor-General'. It was clearly understood that this body was to be a Parliamentary Cabinet on the English model; homogeneous in composition, mutually responsible, politically dependent upon the Parliamentary majority, and acting in subordination to an acknowledged leader. But though this was understood, and indeed implied, by the terms of the Preamble it was, in curious deference to English convention, not specifically set forth in the Constitution. There was not even a provision, as there is in the Australian Commonwealth Act, that the members of the Privy Council should be members of the Legislature. The number of the Dominion Cabinet has varied with the growth of new administrative departments, and now<sup>1</sup> consists of nineteen members: a Premier-President of the Cabinet; a Secretary of State, a Postmaster-General, an Attorney-General, fourteen Ministerial heads of public departments, such as Trade and Commerce, Justice, Finance, Railways, Labour, Militia, and Defence, and two Ministers without portfolio.

In the working of the Cabinet-system in Canada the English customs and conventions have in the main been followed with curious fidelity. The Governor occupies a position as closely parallel as circumstances permit with that of the Crown. Lacking the prestige of an

<sup>1</sup> 1925.

hereditary Sovereign and bereft of the historic environment of a Court, a Dominion Governor may, and not infrequently does, exercise a real influence not merely upon social but upon political life. Some years ago Mr. Goldwin Smith was moved to write: 'A Governor is now politically a cipher, he holds a petty court and bids champagne flow under his roof, receives civic addresses and makes flattering replies, but he has lost all power not only of initiation but of salutary control.' But Mr. Goldwin Smith's powerful pen was admittedly dipped in gall, especially when he dealt with the affairs of his immediate neighbours. In the case of a Colonial Governor, as indeed of an hereditary Sovereign, much must necessarily depend upon political experience and individual personality, but a Governor possesses and, if tactful, is permitted to exercise in political affairs the same sort of power as the Sovereign whom he represents.

Thus the adoption of the federal principle in Canada did not affect the formal position of the Executive, which was to remain strictly 'parliamentary'. Nevertheless the Constitution of 1867 is of peculiar interest to the student of Comparative Politics as representing the first attempt to combine the Cabinet-principle with that of federalism. The Constitution of the Australian Commonwealth is in this respect even more interesting than that of Canada, since the Canadian Constitution is in several respects less genuinely federal than that of Australia. In neither case, perhaps, has the experience been sufficient to justify any positive conclusion as to the compatibility of the two principles. Whether a parliamentary executive, the successful working of which depends almost wholly upon precedent custom and convention, can permanently co-exist with a federal constitution which is necessarily written and rigid, is a question which it were premature to attempt to answer. It must for the present suffice to say that the experiment has succeeded beyond reasonable expectation in Canada, and has by no means failed in Australia.

Legislative power was vested in a Parliament for Canada, consisting of the Queen, an Upper House or Senate, and a House of Commons. The Governor-General was authorized to assent in the Queen's name to Bills presented to him in the two Houses, or to withhold the Queen's assent, or to reserve the Bill for the signification of the Queen's pleasure. Bills to which the Governor-General had assented might be disallowed by the Queen, by Order-in-Council, at any time within two years after the receipt of an 'authentic copy of the Act' by the Secretary of State. Bills reserved for the Queen's pleasure were not to come into force unless and until, within two years from the day on which they were presented to the Governor-General for the Queen's Assent, the Governor-General signified, by Speech or Message to each of the Houses of the Parliament or by Proclamation, that they had received the Assent of the Queen-in-Council.<sup>1</sup> That such reservation was no mere form is clear from the fact that between 1867 and 1877 no less than twenty-one Bills were actually reserved.<sup>2</sup>

The Legis-  
lature

The Federal Parliament, like the Union Parliament established in 1840, was to consist of two chambers. Under the *Union Act* the Second Chamber or Legislative Council was to consist of not fewer than twenty persons nominated by the Crown for life. But the nominated Second Chamber was not a success, and in deference to an agitation, more or less persistent, it was decided, in 1856, to abandon the nominee system. The existing members of the Council were to be left undisturbed, but vacancies as they occurred were to be filled by election. The Province was divided into forty-eight electoral areas, Ontario and Quebec each retaining twenty-four members. The electors were to be the same as those for the House of Commons, but the electoral areas were to be larger; the term of service was to be eight years instead of four, and

The  
Senate

<sup>1</sup> *British North America Act* (1867), iv. 56, 57.

<sup>2</sup> Cf. Egerton, *Federations, &c.*, p. 137. After 1877 the practice was altered. For reasons see *Can. Sess. Papers*, 1877, No. 13 (cited by Egerton).

elections were to be held biennially—twelve Senators being elected at a time. Lord Elgin expressed the opinion that 'a second legislative body returned by the same constituency as the House of Assembly, under some differences with respect to time and mode of election, would be a greater check on ill considered legislation than the Council as it was then constituted'.<sup>1</sup> Lord Elgin's anticipations were not fulfilled. The experiment of 1856 was not more successful than the nominee system which it superseded.<sup>2</sup>

The Federal Act of 1867 reverted to the principle of nomination. The Senate, as then constituted, was to consist of seventy-two members, and was, like that of the United States, to embody and emphasize the Federal idea. Quebec, Ontario, and the Maritime Provinces (Nova Scotia and New Brunswick) were to be equally represented in the Senate, twenty-four members being nominated from each. But in subsequent amendments this principle has not been maintained. An Act of the Imperial Legislature, in 1871, authorized the Dominion Parliament to provide for the due representation in the Senate of any Provinces subsequently admitted to the Federation. Under these powers four Senators each have been assigned to Manitoba, Alberta, Saskatchewan, and British Columbia. The Act of 1867 provided (§ 147) that Prince Edward Island, if it elected to join the Federation, should have four Senators, but in this event the Senatorial representation of the other Maritime Provinces, Nova Scotia and New Brunswick, was to be automatically reduced to ten each. The contemplated event having since occurred, the Senate now consists of ninety-six members apportioned to the several provinces in accordance with the Acts enumerated above.

Subject to this apportionment, Senators were to be nominated for life by the Governor-General—in practice

<sup>1</sup> Quoted by Goldwin Smith, *Canada and The Canadian Question*, p. 164.

<sup>2</sup> Cf. J. A. R. Marriott, *Second Chambers*, pp. 137 seq.

on the advice of his responsible Ministers. A Senator was to be (a) of the full age of thirty years; (b) a British subject; (c) a resident in the Province for which he was appointed; and (d) possessed of real property of the net value of not less than four thousand dollars within the Province. He may at any time, and under certain contingencies must, resign his seat.

No direct provision was made in the Act for a deadlock between the two Houses, but power was given to the Crown to nominate three or six additional Senators, representing equally the three divisions of Canada. In 1873 the Canadian Cabinet advised the exercise of this power, but the Imperial Government refused to sanction it, on the ground that it was not desirable for the Queen to interfere with the Constitution of the Senate, 'except upon an occasion when it had been made apparent that a difference had arisen between the two Houses of so serious and permanent a character that the Government could not be carried on without her intervention, and when it could be shown that the limited creation of Senators allowed by the Act would apply an adequate remedy.'<sup>1</sup>

It will be observed that the Canadian Senate attempts to combine several principles which, if not absolutely contradictory, are clearly distinct. Consequently it has never possessed either the glamour of an aristocratic and hereditary chamber, or the strength of an elected assembly, or the utility of a Senate representing the federal as opposed to the national idea. Devised with the notion of giving some sort of representation to provincial interests, it has, from the first, been manipulated by party leaders to subserve the interests of the central Executive.

The House of Commons was to consist of 181 members: 82 being assigned to Ontario, 65 to Quebec, 19 to Nova Scotia, and 15 to New Brunswick. Quebec was always to retain 65 members; the representation of the other Provinces was to be readjusted after each decennial census,

The  
House of  
Commons

<sup>1</sup> *Canadian Sess. Papers*, 1877, No. 68, *ap.* Egerton, p. 129.

but in such a way that the representation of each Province should bear the same proportions to its population as 65 bears to that of Quebec.<sup>1</sup> The House of Commons was to sit for five years, and was to have the right of originating Money Bills, on the sole recommendation of the Executive. Otherwise the powers of the two Houses were to be co-ordinate.

Provincial  
Constitutions

In each Province there was to be a Lieutenant-Governor appointed by the Governor-General and assisted by an Executive Council; the Legislature was to consist of two Houses in Quebec, New Brunswick, Nova Scotia, and one in Ontario.<sup>2</sup> Certain matters were specifically assigned to the Provincial Legislatures, but the residue of powers was vested in the Dominion Parliament. This is a feature of primary importance, and it is one which differentiates the Canadian Constitution alike from that of the United States, and from that of the Australian Commonwealth. In the latter it is the Federal authority to which certain special powers are delegated by the Constituent States, and any power which is not so delegated remains vested in the State. The Canadian solution of this crucial problem is an interesting memorial to the historical circumstances under which the Constitution came to the birth. Macdonald, as we have seen, and many of his more influential colleagues would have preferred a legislative union. They were baffled by 'the centrifugal nationalism of Quebec'.<sup>3</sup> But, though accepting the inevitable, they were resolved to infuse into Canadian federalism as much of unitary cohesion as Quebec would tolerate.

Growth  
of the  
Canadian  
Federation

The original constituent Provinces of the Dominion were, as already indicated, Quebec, Ontario, New Brunswick, and Nova Scotia, but provision was made in the Constitution for the admission of other Colonies or territories: in particular Newfoundland, Prince Edward

<sup>1</sup> The number is now (1925) 245.

<sup>2</sup> All the Provincial Legislatures are now (1925) unicameral except those of Quebec and Nova Scotia.

<sup>3</sup> Goldwin Smith, *Canada and the Canadian Question*, p. 158.

Island, and British Columbia. Newfoundland has continued, in pride of birth, to stand aloof from her younger sisters,<sup>1</sup> but hardly had the British North America Act come into force (1 July 1867) when resolutions were adopted in the Dominion Parliament in favour of the union of Rupert's Land and the North-West Territory. Before the Crown could give effect to these resolutions a preliminary arrangement had to be reached between the Dominion Government and the Hudson Bay Company. The latter agreed, in consideration of the sum of £300,000 and certain reserved tracts of land, to surrender its territorial rights to the Crown, and by Order-in-Council (23 June 1870) Rupert's Land and the North-West Territory were admitted to the Union. In the same year the Province of Manitoba was carved out of the Territory, and was formally admitted a member of the Dominion, with representation according to population in the Canadian House of Commons, and three Senators in the Upper House. These arrangements were confirmed by an Act of the Imperial Parliament<sup>2</sup> in 1871, and by the same Act the right of the Dominion Parliament to establish provinces in new territories forming part of the Dominion was made clear. A subsequent Act of 1886<sup>3</sup> gave the Canadian Parliament power to provide representation in the Senate and House of Commons for territories not yet included in any province.<sup>4</sup> In 1905 two further provinces, those of Alberta and Saskatchewan, were carved out of the North-West Territory, and were admitted with appropriate representation into the Dominion. Long before that, in 1871, British Columbia had taken advantage of the provision made in the Act of 1867 for its admission to the Dominion, and by Order-in-Council (16 May 1871) its admission was formally ratified. Prince Edward Island was similarly admitted in 1873.

As yet, however, the Great Dominion was very loosely

<sup>1</sup> In 1895 Newfoundland made overtures for union but they were not accepted by the Dominion.

<sup>2</sup> 34 & 35 Vict. c. 28.

<sup>3</sup> 49 & 50 Vict. c. 35.

<sup>4</sup> Egerton, *op. cit.*, p. 167.



compacted. To real political union physical geography opposed in fact an effective barrier. Between the maritime provinces on the Atlantic littoral and the maritime province which occupies the Pacific slope there intervened more than three thousand miles of territory, not to speak of a chain of mountains apparently insurmountable. The engineer was consequently called in to complete the work of the legislator.

The  
Canadian  
Pacific  
Railway

Nothing less than the construction of a trans-continental railway could overcome the categorical negative of Nature. Such a railway was indeed a condition of the union between Canada and British Columbia.

'The Government of the Dominion', so the agreement ran, 'undertakes to secure the commencement simultaneously, within two years from the date of the union, of the construction of the railway from the Pacific towards the Rocky Mountains, and from such point as may be selected east of the Rocky Mountains towards the Pacific, to connect the seaboard of British Columbia with the railway system of Canada; and further, to secure the completion of such railway within ten years from the date of such union.'

The work of construction ought to have begun in 1873. As a matter of fact various delays interposed, and it was not until 1880 that the great enterprise was actually initiated. The contract stipulated that the work should be completed by 1891, but so rapid was the progress that it was finished in half that time, and the line was opened in 1886.

The Canadian Pacific Railway is from every point of view—political, economic, and strategic—of the highest significance, and deserves to rank among the most imposing imperial achievements of the century. Its terminals are at Montreal and Vancouver respectively, its total length of line is 2,909 miles, or about half the distance which separates Liverpool from Vancouver. Of the engineering difficulties encountered in its construction, some idea may be gleaned from the fact that it crosses the Rocky Mountains at an elevation of 5,560 feet. It was the work of

private enterprise, but in order to expedite and encourage its construction the Dominion Government granted to the company a subsidy of £5,000,000, together with a land grant of 25,000,000 acres, and the privilege of permanent exemption from taxation. No privilege could, however, be too great for an enterprise of such high imperial significance. To enable the farmers of Western Canada to feed the mill-hands of Lancashire and the miners of South Wales; to bring Liverpool within a fortnight of Vancouver; to unite in commercial and political bonds the Pacific slope and the Atlantic littoral—this was the purpose and this was the achievement of the Empire-builders who planned and constructed the Canadian Pacific railroad. Of the work of federation that railroad was at once the condition and the complement.

From the achievement of a federal union in Canada to the history of the movement towards federation in Australia the transition is easy. Not that the circumstances were parallel, or that the constitutions are by any means identical. The Canadian movement was, as we have seen, in part centripetal, in part centrifugal; the movement in Australia was wholly centripetal. Canada was confronted with a racial problem; Australia is in almost unique degree racially homogeneous. Between Canada and her powerful neighbour there is a land frontier, three thousand miles in length, in many parts indefensible and in some almost undefinable. For the Canadian provinces union was an absolute condition of independent existence; in Australia it became a matter of high expediency, but only after the relatively recent advent into the Pacific of great European Powers.

The Federal Commonwealth of Australia

Yet to the prescient mind of Lord Grey, Secretary of State for the Colonies (1846-52),<sup>1</sup> the expediency of union between the several British Colonies in Australia became

... Earlier schemes of union

<sup>1</sup> Sir Henry George, third Earl Grey (1802-94); to be distinguished from Sir George Grey, second Baronet (1799-1882), who was Colonial Secretary (1854-5); also from Sir George Grey, the celebrated Colonial Governor (1812-98).

apparent as early as 1847, and in that year he drafted a scheme for a Federal Constitution.

‘Considered as members of the same Empire, these [Australian] Colonies’, wrote Lord Grey, ‘have many common interests the regulation of which in some uniform manner and by some single authority may be essential to the welfare of them all. Yet in some cases such interests may be more promptly, effectively and satisfactorily decided by some authority within Australia itself than by the more remote, the less accessive, and, in truth, the less competent authority of Parliament.’<sup>1</sup>

Lord Grey referred the matter to the Committee of the Privy Council on Trade and Plantations, recalled into existence for this purpose, and the Committee recommended the appointment of a Governor-General of Australia who should be assisted by a General Assembly, to be known as the House of Delegates and to be composed of not less than twenty and not more than thirty members elected by the several colonial legislatures.

The new Assembly was charged with the immediate task of formulating a uniform tariff for all the Australian Colonies and of establishing a General Supreme Court, but it was to have power to legislate on matters of common interest to all the Colonies represented in it, if and in so far as it was empowered to do so by the constituent colonies.

A Bill to give effect to these recommendations was introduced into the Imperial Parliament in 1849, and a second in 1850, but in consequence of the opposition which the attempt evoked both at home and in Australia, it was abandoned, and for the moment nothing came of it save the title of Governor-General which was conferred upon the Governor of New South Wales. The distinction thus given to one colony, even though it was the oldest and most important, served only to excite the jealousy of the rest and thus to retard the movement towards unity. The title was wisely allowed to lapse in 1861.

<sup>1</sup> *ap. Egerton, op. cit.*, p. 41.

The time was not yet ripe for federation; but the question was kept to the front in Australia largely through the efforts of Gavan Duffy, who though deported from Ireland for his share in the revolutionary movement of 1848, proved himself a far-sighted statesman in Australia. The Report of the Committee of the Victorian Assembly which he drafted has been justly described as one of the ablest documents ever written in favour of Australian federation.

Gavan  
Duffy's  
Report

'Neighbouring States of the second rank', so the Report ran, 'inevitably become confederates or enemies. By becoming confederates so early in their career the Australian Colonies would, we believe, immensely economize their strength and resources. They would substitute a common material interest for local and conflicting interests, and waste no more time in barren rivalry. They would enhance their material credit and obtain much earlier a power of undertaking works of serious cost and importance. They would not only save time and money, but obtain immense vigour and accuracy by treating larger questions of public policy at one time and place, and in an assembly which it may be presumed would consist of the wisest and most experienced statesmen of the colonial legislatures. They would set up a safeguard against violence and disorder, holding it in check by the common sense and the common peace of the federation. They would possess the power of more promptly calling new States into existence throughout their extensive territory, as the spread of population required it, and of enabling each of the existing States to apply itself without conflict or jealousy to the special industry which its position and resources render most profitable.'

The Committee accordingly proposed to hold a conference of delegates from the several Colonies and leave them to decide which plan of union they would recommend to the people: a mere Consultative Council, empowered to draft proposals for the sanction of the State Legislatures; or a fully equipped Federal Constitution with a Federal Legislature and Federal Executive; or a compromise between the two. The Duffy scheme

elicited only a moderate measure of support even in Victoria, and encountered active opposition elsewhere; but, not to be denied, he persisted in agitation, and in 1862 another Victorian committee, appointed at his instance, reported strongly in favour of immediate action.

'The condition of the world,' it was said, 'the danger of war, which to be successfully met must be met by united action, the hope of a large immigration, which external circumstances so singularly favour, the desire to develop in each Colony the industry for which nature has fitted it, without wasteful rivalry, and the legitimate ambition to open a wider and nobler field for the labours of public life, combine to make the present a fitting time for reviving this project. It is the next step in Australian development. In the eyes of Europe and America what was a few years ago known to them only as an obscure penal settlement in some uncertain position in the Southern Ocean, begins to be recognized as a fraternity of wealthy and important States, capable of immense development; and, if our current history and national character are in many respects misunderstood, we shall perhaps best set ourselves right with the world by uniting our strength and capacity in a common centre and for common purposes of undoubted public utility.'

Again the efforts of Mr. Duffy and his Victorian supporters proved abortive. Nor were the reasons far to seek: on the one hand, the external dangers to Australia had not yet become acute, on the other there had developed between the two leading colonies a deeply rooted difference of opinion in regard to tariffs. Between New South Wales, the parent State, and its lusty and ambitious offspring, Victoria, there had already been a good deal of friction which was further intensified by the rapid development of the Victorian gold-fields, and was brought to a climax by the violence with which Victoria espoused the protectionist creed. The Free Traders of Sydney regarded with mingled contempt and alarm the upstart protectionists in Melbourne. Thus federal projects were permitted for some twenty years to slumber.

They were reawakened by the repercussion produced in the Pacific by events in Europe, and in particular by the development among the European chancelleries of a *Weltpolitik*. Welt-politik

By the eighties the world was palpably shrinking. The opening of the Suez Canal; the new Imperialism proclaimed by Lord Beaconsfield; the purchase of the Khedive's shares in the Canal; the proclamation of Queen Victoria as Empress of India; the acquisition of Cyprus; the occupation of Egypt by England and of Tunis by France; the activity of Russia in the Middle East and of France in the Farther East; above all the sudden bound of Imperial Germany to the front rank among Colonial Powers; her acquisition in a single year of a great empire in Africa and her intrusion into the Pacific—all these things announced the dawn of a new era in international affairs. The Australasian Colonies found themselves to their chagrin suddenly drawn into the maelstrom of Western politics.

The colonists were more quick to perceive the significance of these events than the statesmen of the homeland. In 1883 great excitement was aroused by the escape of some convicts from the French penal settlement of New Caledonia into Australia; still more by the rumoured intention of France to annex the New Hebrides, and, most of all, by the report that Germany had annexed the North of New Guinea. Queensland attempted 'to force the hands of the Home Government by taking possession of the whole island in the name of the Queen'; but Lord Derby disallowed its action.<sup>1</sup> Lord Derby's indifference or apathy aroused deep resentment in Australia at the time, and produced lasting effects upon colonial opinion as to the necessity for some form of federal union, if not of Imperial representation. In fairness to the Home Government it should be remembered, as Mr. Egerton justly observes, that in 1876 New Guinea, as well as the New Hebrides, might have been

Neigh-  
bours in  
the  
Pacific

<sup>1</sup> Egerton, *op. cit.*, pp. 51 seq.

gained for the Empire had the Australian Colonies, in Lord Cairnvarvon's words, been ready 'to give trial and effect to the principle of joint action amongst the different members of the Empire in such cases'. The realization of their own shortcomings did not tend to sweeten the pill they now had to swallow, but it did impel them to resume, in more serious temper, consideration of the question, on the one hand of more effective representation in the Imperial Economy, and on the other of closer union among themselves :

✓ 'An ambition', writes Lord Bryce, 'which aspired to make Australia take its place in the world as a great nation, mistress of the Southern Hemisphere, had been growing for some time with the growth of a new generation born in the new home, and was powerfully roused by the vision of a Federal Government which should resemble that of the United States and warn off intruders in the Western Pacific as the American Republic had announced by the pen of President Monroe that she would do on the North American Continent.'<sup>1</sup>

Renewed  
efforts to  
achieve  
union,  
1883

✓ To meet the new situation a conference was summoned in 1883. There were present delegates from New Zealand and Fiji as well as from all the Australian Colonies. The conference endorsed a scheme formulated by Sir Henry Parkes and Sir Samuel Griffiths, and in 1885 the Imperial Parliament enacted it as *The Federal Council of Australasia Act, 1885*. ✓ Under this Act the Federal Council was empowered to safeguard Colonial interests in the Pacific, and to deal with deep sea fisheries, with extradition and various technical matters, and with any other matters referred to it by the several Parliaments of the constituent States; but it had no executive power, no command of money; participation by any colony was purely voluntary, and might be terminated at any time. Only four Colonies joined, and one of them, South Australia, afterwards withdrew; New South Wales held aloof from the outset, and its attitude proved fatal to the success of the experiment.

<sup>1</sup> Bryce, *Studies in History*, i, 481.

Nevertheless the need for closer union was generally and increasingly recognized, especially in relation to common defence, and in 1888 an important step was registered when the Colonies agreed to contribute towards the maintenance of an Australian auxiliary naval squadron. A year later General Bevan Edwards, in reporting upon the question of military defence, put in the forefront the urgent necessity of some form of federal organization. In the same year (1889) Sir Henry Parkes delivered at Tenterfield a great speech which, according to a colonial authority, 'is usually reckoned the beginning of the final converging movement of the six colonies'.<sup>1</sup> Parkes declared that the time was come 'to set about creating a great national government for all Australia', and the opinion carried the greater weight as coming from the Prime Minister of New South Wales. The need was primarily local but, as Mr. W. Pember Reeves caustically insists, other considerations were not without influence.

'The air of icy superiority persistently worn by the Colonial Office, the Foreign Office, and the Admiralty when transacting business with separate colonies did quite as much perhaps to irritate colonial leaders into speculating whether something big—say a federated continent—might not be required to impress the official mind at home.'<sup>2</sup>

From this time things began to move more rapidly. A convention consisting of forty-five delegates from all parliaments of Australasia—including Tasmania and New Zealand—met at Sydney in 1891, and produced a scheme which accurately anticipated the ultimate form assumed by the Commonwealth Constitution. The only material points of difference were that the Senate was to be elected by the State Legislatures, and that no direct provision was made that the Executive should be 'parliamentary'. New Zealand refused to come in, definitely declaring against any federal scheme 'except a federation with the mother-country', but the postponement of

<sup>1</sup> W. Pember Reeves, *State Experiments in Australia and New Zealand*, i. 145.

<sup>2</sup> *Op. cit.* i. 150.



The  
Adelaide  
Conven-  
tion, 1897

a singularly promising scheme was due partly to the persistent hostility manifested by the Free Traders and the Labour Party in New South Wales, and partly to the financial crisis which supervened. Negotiations were, however, resumed in 1895, when the several Prime Ministers met at Hobart. As a result of this meeting, enabling Acts were passed by the several Colonial Parliaments under which special delegates were elected by popular vote to a convention which met at Adelaide in 1897. In this convention the work was practically accomplished ; a Constitution based mainly on the scheme of 1891 was drafted and was submitted to the several Colonial Legislatures, and by them was freely amended. The Draft as thus amended was reconsidered by the Adelaide convention, and was then submitted to a plebiscite in each colony. Only New South Wales failed to ratify it by the prescribed majority, but after further amendment at the hands of a second conference of Premiers, the assent of New South Wales was obtained, and the Constitution in its penultimate shape was sent home for the consideration of the Imperial Parliament. With one important amendment it was approved at Westminster and received the Royal Assent in the last year of Queen Victoria's reign. That assent was more than formal, for it was accompanied by the Queen's fervent prayer ' that the inauguration of the Commonwealth may ensure the increased prosperity and well-being of my loyal and beloved subjects in Australia '.

This tedious enumeration of the stages through which the Commonwealth Constitution passed will at least serve to indicate that the Constitution was the result of careful circumspection and prolonged deliberation, and was devised with ardent anxiety to omit nothing that could contribute towards, to include nothing that could militate against, the successful consummation of federal unity.

Argu-  
ments for  
Federa-  
tion  
✓

The compelling reason which brought into existence the Federal Commonwealth was undoubtedly the presence of European neighbours in the Pacific. Federation would

probably have come in any case, but its coming might have tarried for many years had not the French been in the New Hebrides, and had not the Germans occupied New Guinea and the Bismarck Archipelago. Hardly less insistent than the need for a common system of military defence was the problem of devising adequate and uniform regulations against the immigration of coloured races. The commercial classes anticipated great advantages from the abolition of intercolonial tariffs, from uniformity of railway regulations and rates, from common control of the inland waterways and irrigation schemes from uniformity in commercial legislation, and above all perhaps from the improvement in credit. The Labour Party welcomed the possibility of old-age pensions, and other schemes of social reform; suitors hoped to avoid expense and delay by the erection of a High Court of Justice which should virtually supersede the appellate jurisdiction of the Privy Council; while all parties and all classes were filled with legitimate pride at the birth of a new nation and at the entrance of the Commonwealth as a nation-state into world-society.

It remains to indicate the outstanding features of the constitutional machinery, under the operation of which these results were to be achieved.

Pro-  
visions of  
the Com-  
mon-  
wealth  
Constitu-  
tion  
The Com-  
mon-  
wealth  
and the  
States

The point of most vital importance in every Federal Constitution is the determination of the relations between the Central or Federal Power and the constituent States or Provinces. The Australian Commonwealth Act follows the precedent of the United States of America and the Swiss Confederation. In the former case all powers not specifically conceded to the Federal Government, nor specifically prohibited by the Instrument to the States, remain vested in the States. Similarly in Switzerland the cantons are sovereign, except in so far as their sovereign rights are specifically curtailed by the Federal Constitution: the residue of powers is vested in the cantons. In both cases, as we have seen, historical circumstances explain this division of powers, inclining the balance in

favour of the constituent republics whose conjunction brought into being the Federal Unions.

✓ In the case of Canada it is otherwise. The Dominion Constitution, though federal in form, is in spirit unitary. The Provinces exercise, therefore, only such powers as are delegated to them by the Constitution.

Legisla-  
tion      The Commonwealth Act<sup>1</sup> provided (§ 107) :

'Every power of the Parliament of a Colony which has become or becomes a State shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State as the case may be.'

✓ The range of powers which are or will be withdrawn from the State Legislatures or vested in the Federal Legislature is, however, very wide. In all there are thirty-nine classes of subjects enumerated in Section 51 of the Commonwealth Act in regard to which the Federal Legislature has power to make laws. Of these some are exclusively vested in it, in regard to others it enjoys only concurrent jurisdiction. Among the former are customs and excise, bounties on exports, coinage, and naval and military defence. Among the concurrent powers are : banking (other than State banking), bankruptcy, census and statistics, copyrights, patents and trade marks, matrimonial causes, naturalization, immigration and emigration, insurance (beyond State limits), foreign commerce, posts, telegraphs, &c., weights and measures.

✓ On the other hand the residual jurisdiction of the States includes authority over all such matters as : agriculture, education, charities, factories, forests and fisheries, health, friendly societies, liquor control, police, prisons, and State railways. Above all the State Legislatures possess, subject only to the veto of the Crown, the right to amend, maintain, and execute their own Constitutions. The dignity of the States is further consulted by the provision that the State Governors (unlike the Lieutenant-Governors

of the Canadian Provinces) shall continue to be appointed by the Crown and have the privilege of direct communication with the Colonial Office.

In regard to the administration of justice the Commonwealth stands midway between Canada and the United States. In Canada there is only one set of courts, the judges of which are appointed by the Dominion Government and are removable only by the Governor-General on an address from the Senate and the House of Commons. In the United States there is complete reduplication of courts: a complete system of Federal Courts—from the Courts of First Instance up to the Supreme Court—existing throughout the Union side by side with, and entirely independent, of the State Courts. Nor is there any appeal from the State Courts to the Federal Courts: each system is self-contained.

The Australian Judiciary is less completely federal than that of the United States, less unitary than that of Canada. On the one hand there is a Federal Supreme Court known as the High Court of Australia; on the other, the State Courts are invested with federal jurisdiction. Further, an appeal lies from the State Courts to the Federal Supreme Court. The appellate jurisdiction of the King-in-Council remains unimpaired. On this point there was considerable discussion when the Draft Constitution was under consideration by the Imperial Parliament. In the Draft it was provided that on any question arising as to the interpretation of the Commonwealth Constitution, or the State Constitutions, the decision of the High Court of Australia should be final, unless 'the public interests of some part of Her Majesty's dominions other than the Commonwealth or a State are involved'. To that provision and in particular to the ambiguity of the phrase 'public interests' strong exception was taken by the Imperial Government. The principle maintained by the Imperial Government was thus defined by Mr. Chamberlain when he moved the second reading of the Bill: Australia was to be left

'absolutely free to take its own course where Australian interests' were 'solely and exclusively concerned'; but in all cases in which other than Australian interests were concerned the right of appeal to the Privy Council was to be fully maintained. This principle is embodied in the section (§ 74) of the Act dealing with the question of appeal to the Queen-in-Council. The section runs as follows:

'No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

'The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council.

'Except as provided in this section this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal Prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.'

This section is plainly concerned with a matter of high constitutional as well as practical significance, and before it assumed its final form it underwent many modifications. Even in its final form it was not immune from criticism. High authorities, such as Lord Russell of Killowen, Lord Davey, and Mr. (now Viscount) Haldane, held that there was at least a possibility of a conflict of authority. While, in the specified cases, there was no appeal from the High Court except by its own leave, an appeal did lie from the decision of the State Courts direct to the Privy Council. Nor did experience weaken the strength of the objections foreseen. The Privy Council

and the High Court did actually deliver conflicting judgments on the same subject. Thus in reference to the competence of a State Government to levy income-tax on the salary of a federal official the Privy Council decided in the affirmative, the High Court in the negative. In a subsequent case the High Court of the Commonwealth refused to follow the ruling of the Privy Council, on the ground that the Privy Council ought to have held itself bound, where a case came before it on direct appeal from a State Court, to accept the judgement of the High Court. The impasse was ultimately resolved by an Act of the Commonwealth Parliament (1907, No. 8), which abolished the concurrent jurisdiction of the Courts of the States in reference to questions relating to the constitutional rights and powers of the Commonwealth and the States *inter se*.<sup>1</sup> The solution thus reached was consonant at once with common sense and with the spirit of the Commonwealth Constitution, and redounded to the credit of the Dominion Legislature.

The Commonwealth Act decreed that the Legislature should consist of two Houses: a Senate and a House of Representatives. The Legislature

The principle which lies at the root of the *Senate* is pointedly suggested by the alternative titles which were originally considered for it: the *House of the States*, or the *States Assembly*. Like the American *Senate* it represents the federal principle; it stands for the Constituent States and accords to each State equal representation—a principle not asserted without strong and intelligible protests from the larger States. To the smaller States, on the other hand, this principle was the condition precedent, the 'sheet anchor' of their rights and liberties. And, once asserted, it is fundamental and (except in unimaginable conditions) unalterable. The Senate

The Senate consists of thirty-six members—six for each

<sup>1</sup> On the whole question cf. Egerton (*op. cit.*), p. 212, who refers to the cases of *Deakin v. Webb* (1 C. L. R. 585) and *Webb v. Outtrim* (L. R. E. 1907, A. C. 81) and Keith, *op. cit.*, pp. 1157-73.

State ; but it is provided by the Constitution (§ 7) that 'Parliament may make laws increasing or diminishing the number of Senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six Senators'. Further, in the section defining the machinery for constitutional amendment (§ 128) it is provided that 'no alteration diminishing the proportionate representation of any State in either House of the Parliament . . . shall become law unless the majority of the electors voting in that State approve the proposed law'. The Senators are to be 'directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate' (§ 7). The latter stipulation has proved to be, perhaps unexpectedly, important. The voting is by *scrutin de liste* : each voter has as many votes as there are places to be filled. This method, as is well known, permits, if it does not encourage, a good deal of political manipulation, and enables a well-organized majority to sweep the board. But its significance in relation to senatorial elections in Australia can only be appreciated to the full if it is remembered that the qualification of a Senator is identical with that of a member of the House of Representatives, and that the electors are the same for both Houses. The power of the Senate is thus drawn from precisely the same source as the Lower House, and it is drawn 'in the concentrated form of support from large constituencies'.<sup>1</sup> The result is that the Australian Senate is the only Upper House in the world which is less conservative than the Lower. It should be added that the Senate is elected for six years, while the Lower House is elected for three, and that half the Senators retire triennially. The provision for filling casual vacancies is exceedingly elaborate and precise. If the vacancy is notified while the State Parliament is sitting, the Houses of Parliament of the State 'shall, sitting and voting together, choose a person to hold the

<sup>1</sup> B. R. Wise, *Making of the Australian Commonwealth*, p. 70.

place until the expiration of the term or until the election of a successor . . . whichever shall first happen '. If the State Parliament is not in session

'the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until fourteen days after the beginning of the next session of the Parliament of the State or until the election of a successor, whichever first happens. At the next election of members of the House of Representatives or at the next election of Senators for the State, whichever first happens, a successor shall, if the term has not then expired, be chosen to hold the place from the date of his election until the expiration of the term ' (§ 15).

These minute regulations at any rate testify to the extreme importance which is attached by the most democratic community in the world to membership of the Second Chamber.

One or two other points in regard to the composition and procedure of the Senate demand attention. Though federal in constitution, the Senate is 'unitary in action'. It is expressly provided (§ 11) that 'the Senate may proceed to the dispatch of business notwithstanding the failure of any State to provide for its representation in the Senate', and (§ 22) that the presence of one-third of its members (until the Parliament otherwise provides) shall form a quorum. The voting is personal and not according to States. Each Senator has one vote, and any question which may arise is determined by a simple majority.

A noticeable attribute of the Senate, albeit one which it shares with Second Chambers in general, is that of 'perpetual existence'. Except in the event of a constitutional deadlock, it cannot be dissolved. The Senators are elected for six years, one-half of them retiring every three years. Thus the Senate, unlike the Lower House, is never, except under the circumstances alluded to, wholly new or wholly old.

The qualification for senatorships is exceptionally easy.



A Senator must be of full age ; he must be a natural-born subject of the King, or a subject naturalized according to the laws of the United Kingdom or any of the constituent States ; and his ' qualification ' must be ' in each State that which is prescribed by this Constitution or by the Parliament, as the qualification for electors of members of the House of Representatives ' (§ 8). No person may, under heavy penalties, continue to sit, in either House, who is convicted of serious crime, or becomes bankrupt, or ' has any direct or indirect pecuniary interest in any agreement with the public service of the Commonwealth ', or ' holds any office of profit under the Crown or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth '. But it is provided that this last disqualification shall not exclude Ministers of the Commonwealth or the States ; and elsewhere (§ 64) it is expressly laid down that ' no Minister of State shall hold office for a longer period than three months unless he is or becomes a Senator or a member of the House of Representatives '. Not even in the United Kingdom itself is the correspondence between Legislature and Executive so closely and securely guaranteed. In regard to remuneration Senators and members of the Lower House are treated alike—each receiving £1,000 a year.<sup>1</sup>

The functions of the Senate, unlike those of the House of Lords and of the American Senate, are purely legislative ; but, subject to an exception to be noted presently, the Senate has ' equal power with the House of Representatives, in respect of all proposed laws ' (§ 53).

Financial  
Powers

As regards finance the provisions of the Constitution are of peculiar interest. Money Bills must originate in the Lower House. The Senate may reject but may not amend them, though it may ' at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting by message the omission or amendment of any items or provisions therein.

<sup>1</sup> Originally £400 : raised to £600 in 1907 and to £1,000 in 1920.

And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.' Moreover, the precautions against 'tacking' and against the introduction of any alien substance into a finance Bill are exceptionally minute and specific. Thus, under Section 53, 'a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition of fines,' &c. Under Section 54 it is provided that 'the proposed law which appropriates revenue or moneys for the ordinary annual service of the Government shall deal only with such appropriation'. Section 55 enacts that

'Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.

'Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.'

These provisions not only afford guarantees against tacking, but no less effectually provide against the device which, following the lead of Mr. Gladstone, the British House of Commons has employed since 1861. There can be no 'omnibus' Budget under the Constitution of the Australian Commonwealth. Thus, as Mr. Harrison Moore justly observes:

'The Constitution . . . prevents the House of Representatives from taking a course which might justify or excuse the Senate in rejecting an Appropriation Bill. In the balance of power in the Commonwealth, it is a factor not to be neglected that, while the Senate has a recognized power over Money Bills beyond that of any other Second Chamber in the British Dominions, it can hardly exercise the extreme power of rejecting the Bill for the "ordinary annual services of the Government" upon any other ground than that the Ministry owes responsibility to the Upper not less than to the Lower

House. That is a position which in the future the Senate, as the House of the States as well as the Second Chamber, may take up; but it is a position from which, even in the history of Parliamentary Government in the Colonies, the strongest supporters of the Upper House have generally shrunk.'<sup>1</sup>

Dead-  
locks

In view of the experience gathered in the working of the State Constitutions it was natural that the authors of the Commonwealth Act should be at special pains to devise effective machinery for the solution of 'deadlocks'. The originality and ingenuity of the Section (§ 57) dealing with this matter justifies quotation *in extenso*:

'If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

If after such dissolution the House of Representatives again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.

The members present at such a joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall

<sup>1</sup> *Commonwealth of Australia*, pp. 122-3.

be taken to have been carried, and if the proposed law, with the amendments, if any, so carried, is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent.'

The machinery here described was devised, as is well known, after the consideration of many alternative solutions. One party, that of the National Democrats, favoured a Referendum, an appeal to the whole body of electors in the Commonwealth. But this solution was naturally distasteful to the smaller States. Others preferred the remedy of dissolution 'to be applied alternatively, simultaneously, or successively to the Senate and the House'. The device ultimately adopted was inspired, partly by the experience of South Australia, but, more specifically, as regards the joint sitting, by the Norwegian system, 'according to which the two Chambers (or rather the two parts into which the House is divided) meet as one for the purpose of composing their differences.'<sup>1</sup> But whatever the source of the inspiration, the device is undeniably ingenious, and makes effective provision against the weaknesses and dangers which have been all too clearly revealed in the Constitutions of the several States.

It is to be observed that on any Bill, whether dealing with finance or not, the Senate can 'force a dissolution'; that the Lower House cannot override the will of the Senate until after an appeal to the electorate, and then only if the will of the electors is declared with emphasis. In this connexion the importance of the stipulation that the numbers of the House must always be double those of the Senate becomes apparent. But for this provision<sup>2</sup> the balance contemplated by the authors of the Constitution might be seriously disturbed. As it is, the will of

<sup>1</sup> Harrison Moore, *op. cit.*, pp. 124-7.

<sup>2</sup> § 24. 'The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of senators.'

the people, as measured by population, must in the last resort prevail against the will of the States, as revealed in the composition and voting strength of the Senate—a further illustration of the democratic spirit by which every part of the Constitution is permeated.

Constitu-  
tional  
Revision

There remains to be noticed the position of the Senate in the machinery devised for constitutional revision. In the Canadian Dominion there is no such machinery. The source of Canada's Constitution is an Act of the Imperial Legislature, and to the same source she must look for the amendment of it. In the United States the precautions against hasty and ill-considered amendments are such as almost to preclude amendment altogether. In the Australian Commonwealth the machinery, though elaborate, is decidedly less complicated and less cumbrous.

Every proposed law for the alteration of the Constitution must be passed by an absolute majority of each House, and must then, after an interval of not less than two and not more than six months, be submitted to the electors in each State. The amendment to become law must be approved by (i) a majority of States, and (ii) a majority of electors in the Commonwealth as a whole. But here as elsewhere State rights are rigidly safeguarded, for 'no alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise affecting the limits of the State . . . shall become law unless the majority of the electors voting in that State approve the proposed law.'

For the event of disagreement on constitutional amendments there is special and interesting provision. Such amendments may, be it noted, originate in either House, but should the Houses differ, the originating House may, after an interval of three months (even in the same session), again pass the amending Bill, and, in the event of a second rejection, the Governor-General may submit it to the electors. Their decision is final. The wording

of the clause—'the Governor-General may submit'—would appear to leave to the Executive in such cases a discretion as to the employment of the Referendum. But it is obvious that a Ministry, anxious for revision, and backed by either House of the Legislature, would never hesitate to submit its proposals to the electorate.

Yet the electorate has proved itself far from tamely acquiescent in the wishes of the Executive and the Legislature. On the contrary though projects for revision, in this direction and in that, have been, on five occasions, submitted to the electorate, only once, in the first twenty years of the life of the Commonwealth, was the requisite majority obtained.

In practice the Senate has, by general consent, failed to fulfil the objects with which it was designed. It has done little to protect special State rights; nor indeed has such protection been required. The Senate, as a former Premier of New South Wales has pointed out, 'has seldom voted on State lines of cleavage, and such issues have very infrequently arisen'.<sup>1</sup> Still less has the Senate exercised a moderating influence in ordinary legislation. Unique among Second Chambers in this as in other respects the Australian Senate has proved itself to be, if not the more democratic, certainly the less conservative of the two Chambers. The electorate being co-extensive with the State, and the election being by 'general ticket', the best disciplined party can, as a rule, secure the election of the whole ticket, and thus entirely exclude the minority from any representation. In the election of 1910 the Labour Party carried every seat in every State, securing at a single *coup* half the seats in the Senate. In 1914, in consequence of a deadlock, both Houses were, in accord with the provisions of the Constitution, simultaneously dissolved, and the whole of the Senate had to be renewed. The Labour Party secured a majority only of eight in the House of Representatives, but in the Senate, though the totality of votes cast was not very

<sup>1</sup> The Hon. Sir Charles G. Wade, *Australia*, p. 65.

unequally divided, the method of election gave them thirty-one seats out of thirty-six. Such results tend to reduce the Constitution to an absurdity, and opinion is steadily gaining ground in favour of a drastic alteration. It can, however, be effected only with the unanimous assent of the States, small as well as large, and their consent will not easily be obtained. Parliament has recently adopted a scheme of Proportional Representation for senatorial elections, in the hope of securing some representation to minorities, but the scheme actually adopted is regarded as only a palliative and has not, thus far, given much satisfaction to those who are enamoured of the principle.<sup>1</sup> Meanwhile the Australian Senate continues to exhibit the unique spectacle of a Second Chamber which has displayed many of the characteristic tactics of a Labour convention. 'The Chamber,' writes Mr. Brand, 'which is usually supposed to act as a drag on revolutionary legislature, has largely occupied itself in passing academic resolutions in favour of the nationalization of all means employed in the production and distribution of wealth, and other projects of a socialistic character.'<sup>2</sup>

The  
House of  
Representatives

The House of Representatives, like the Senate, is directly elected by the people of the Commonwealth. In view of the provision for the solution of deadlocks the Constitution ordains that the number of members shall be 'as nearly as practicable' twice the number of senators. They number seventy-five and are distributed, mostly in single-member constituencies, among the several States according to population. They are elected on the basis of adult suffrage for three years, but the House may be dissolved sooner by the Governor-General. A member must be a British subject, have been for three years

<sup>1</sup> In the election of 1919 the largest of four parties secured seventeen out of eighteen seats with an aggregate of 860,060 votes. One minority seat fell to the party which polled 820,000 votes. Two other parties which together polled 173,000 votes secured no seat. Bryce, *Modern Democracies*, ii. 206.

<sup>2</sup> Hon. R. H. Brand, *Union of South Africa*, p. 67.

a resident in the Commonwealth, and qualified to be an elector. The Speaker is elected from among the members at the beginning of each Parliament, and is now invariably, like the President of the Senate, a party nominee.

The Federal Parliament is endowed with very extensive powers. Its taxative powers are unlimited, so long as it does not discriminate between States or parts of States ; but they are not exclusive. The States possess concurrent powers, except as to the imposition of duties of customs and excise. Its legislative powers, as already observed, extend to no fewer than thirty-nine categories, but being enumerated are not unlimited, the residue of powers being vested as in the State Legislatures. The important and elaborate provisions in regard to the solution of deadlocks between the two Houses have already been noticed in connexion with the Senate.

As compared with the American Congress the Australian Parliament is singularly free from restraint. The American constitutions, alike Federal and State, manifest at every turn profound suspicion of the legislative bodies, and contain elaborate precautions for the protection of the citizens against the abuse of legislative powers. No such suspicion appears to have animated the authors of the Commonwealth Constitution. Parliament, within the wide limits of the Constitution, can, therefore, work its will, without fear or restraint.

Like the State Legislatures and like their common English prototype, the Federal Legislature controls the Executive. The formal executive authority is, of course, vested in the Crown, but it is exercisable by the Governor-General on the advice of Ministers who must be members of the Federal Executive Council, and must also be, or within three months after appointment must become, members of one or other House of the Legislature. This latter is a specific provision (§ 64) of the Constitution, which in that respect was unique among the Constitutions of the English-speaking peoples, until the section was copied into the South Africa Act, 1909. The Ministers



are the heads of seven Government departments: External Affairs, Home Affairs, Post Office, Defence, Trade and Customs, the Treasury, and that of the Attorney-General. The Premier holds one of these offices, not infrequently but not necessarily the Department of External Affairs. In addition, there are generally two or three Ministers without portfolio.

Finance  
and  
Trade

Embodied in the constitutional frame are no fewer than twenty-five clauses devoted to the question of finance and trade. Nor was the prevision of the authors at fault, for as an Australian statesman writes, 'the great lion in the path of the Constitution has been the problem of finance'.<sup>1</sup> To appreciate the difficulties which were anticipated, and have in fact arisen, it is necessary to recall certain outstanding features of the fiscal and industrial situation: (i) that the States were and are large trading corporations and large owners of real property; (ii) that they are consequently large employers of labour; (iii) that the bulk of the State revenues had been raised by customs duties, and that the right to raise such duties was henceforth to be vested exclusively in the Commonwealth; (iv) that the States are exceedingly tenacious of their 'rights' and anxious to maintain their separate and historic identity.

In order to compensate the States for the loss of their customs revenues, and at the same time to discourage the Commonwealth from extravagant expenditure, it was enacted in the Constitution (§ 87) that for ten years the Commonwealth should return to the States 75 per cent. of the customs revenue they collected. This provision, known as the 'Braddon blot',<sup>2</sup> proved highly unsatisfactory. The expenditure of the Commonwealth rose with unexpected rapidity, the Government was compelled to resort to direct taxation, and at the end of the initial period (1911) the assent of the people was obtained by Referendum to a drastic reduction in the amount of

<sup>1</sup> Sir C. G. Wade, *op. cit.*, p. 67.

<sup>2</sup> It was suggested by Sir Edward Braddon, Premier of Tasmania.

revenue returned to the States. Thenceforward it was to be, for a further period of ten years, a fixed sum of 25s. per head, irrespective of the revenue derived from customs duties.

The constitutional and other rights of the States are, as already observed, specifically guaranteed in and by the Instrument (§§ 106-20). The States may not coin money nor legislate in respect of religion, nor raise or maintain, without the consent of the Parliament of the Commonwealth, any naval or military force, and where a State law is in conflict with a law of the Commonwealth the latter shall prevail; but while the Commonwealth may legislate only on the topics specifically enumerated, the residue of powers is vested in the States. The States continue to be diplomatic entities and are still represented in Great Britain by Agents-General, and it was not until 1910 that a High Commissioner for the Commonwealth was, in addition, appointed.

The scope of this book is limited, somewhat strictly, to the machinery of government as formally constituted, but no analysis of the Australian Constitution would be otherwise than grotesquely incomplete if it failed to take account of an unofficial but most potent institution known as the Parliamentary Caucus. This form of political organization has its parallel, as we have already seen, in the United States, but it has thus far played little part in English politics. Half a century ago the advent of the Caucus at Birmingham caused a transient tremor among English politicians; but in this country party organizations, local and central, while performing functions in regard to the selection of candidates, the conduct of elections and so forth, rendered indispensable by the extension of the electorate, have hitherto interfered little in the internal work of the Legislature. The members of the parliamentary Labour Party are, it is understood, subject to strict discipline, as were the parliamentary followers of Mr. Parnell, but over the activities of their members at Westminster the organiza-

The States

The Parliamentary Caucus

tions of the two older parties exercise little continuous influence. A local Party Association may occasionally protest against the action or inaction of its parliamentary representative, but Members of Parliament in England are still very far from having become mere delegates of their constituents, or docile instruments in the hands of party organizations.

The  
Labour  
Party

In Australia the triumph of the Labour Party has induced a very different state of affairs. Party discipline is absolutely strict; members are amenable to the resolutions of a parliamentary caucus which is itself the creature of the Trade Councils. These Trade Councils are, therefore, in effect, the real rulers of the country, whenever the Labour Party is in power.<sup>1</sup> Whether the other parties will be able to resist a similar development, or whether the rapidly improving education of the wage earners will conduce to the election of men of more independent character, are questions which only time can resolve.

The young Federations of Canada and Australia are alike confronted by problems of great complexity and of high significance alike to their own well-being and to that of the larger Commonwealth of which they form integral and important parts. Both Dominions have proved their capacity for the solution of problems not less difficult in the past: each has produced men apt for constructive statesmanship of the highest calibre. There is no reason to apprehend that they will be lacking in the future.

<sup>1</sup> Lord Bryce attaches so much importance to this relatively recent development that he says 'The dominance of the parliamentary caucus has been Australia's most distinctive contribution to the art of politics' (*Modern Democracies*, ii. 496).

## X. THE UNION OF SOUTH AFRICA

'In other countries people and States have usually been most loath to part with one tittle of their independence or individuality, and constitutions have for the most part taken the form of very definite contracts of partnership, setting forth in precise language exactly what each partner surrenders and what he retains. The partners have generally been full of suspicion both of one another and of the new government which they were creating. There is little of this spirit in the South Africa Act.'—HON. R. H. BRAND.

'In South Africa more perhaps than in any other portion of the world, there are common questions of general interest which can only be decided with safety by a general authority expressing the considered judgement of a United South Africa.'—H. E. EGERTON.

'The Government of Great Britain has given Constitutions sometimes to willing and sometimes to unwilling and suspicious recipients. But assuredly it has never given its sanction to a constitutional experiment which has been to so great an extent the product of local conditions or that has so well expressed the Colonial will.'—EARL CURZON OF KEDLESTON (1907).

PARALLEL with the centripetal movements in Canada and Australia was that in South Africa ; but the forces which operated to produce union in South Africa were wholly different from those which had made for federalism in Australia, and scarcely less remote from those which brought about the Dominion of Canada. Nor was the final result by any means identical. The Constitution of the Australian Commonwealth is, as we have seen, typically federal alike in spirit and in form ; the Canadian Constitution, though federal in form, bears traces of the unitary ambitions of its more prominent architects ; South Africa passed at a single stride from separatism to union.

The  
problem  
in South  
Africa

Yet the problems in South Africa were, and are, in many respects even more complex than those by which the other Dominions were confronted. Australia is of all portions of the Empire the most homogeneous in racial conditions. Canada, though containing two European races, is also pre-eminently a white man's country.

The  
Native  
problem

In South Africa it is otherwise; not only are the two European races equally balanced, but both in combination are very greatly outnumbered by the coloured races. Out of the total population of just over seven millions, at the Census of 1921, about a million and a half are whites. Nor are the proportions constant in the several South African colonies. In the Orange River colony there are less than three and in the Transvaal about four coloured persons to each white inhabitant. In Cape Colony there is just one white inhabitant to four coloured. In Natal the proportion is roughly one to ten. The small white community in Natal thus finds itself surrounded by a black population which is not only ten times as numerous as its own but consists of the most warlike tribes in South Africa. The dominant fact, therefore, in the South African problem is to be found in the great preponderance of the coloured races.

Nor is this problem likely to become simpler as time goes on. On the contrary, the improvement of government and the spread of civilization is likely to intensify it. As Mr. Pearson pointed out more than thirty years ago we are 'the blind instruments of fate for multiplying the races which are now our subjects and will one day be our rivals'. In South Africa as in India the rule of the white man has imposed upon turbulent and warlike tribes a *pax Britannica* which has removed the most ancient and the most obvious check upon population. The improvement of sanitary conditions, the partial eradication of barbaric customs such as infanticide and executions on charges of witchcraft, not to mention the increased regularity and certainty of food supplies—all are factors which have operated in the same direction. No discussion of the political problem in South Africa can therefore fail to take account of this dominating and differentiating social fact.

The  
Germans  
in Africa

A third element in the situation differentiating the South African problem from the Australian has lost much of its significance since the Great War. But as one of

the most potent of the causes which contributed to union it cannot, in this analysis, be ignored. During the meetings of the National Convention at Cape Town in 1909 President Steyn used these remarkable words in conversation with Sir Starr Jameson and Sir Percy FitzPatrick.

'I do not pretend to regard things from the same point of view as you do. Nobody with any sense of justice could expect me to feel anything of gratitude to the British Government or the British people. I look only to the interests of South Africa, whilst you have your Imperial interests. Fortunately in this case the interests of the Empire and South Africa are one. Germany is preparing to attack England. . . . This South Africa of ours is Naboth's vineyard, and preparations have gone on for years to get possession of it, preparations made under our very noses. German West Africa is their jumping off ground. It has been prepared and arranged for that purpose. It is useless to them for any other purpose. The population is simply a military force. Their railways are strategic lines laid out for the purposes of war in the country. We must have union to defend ourselves.'<sup>1</sup>

The Germans were relatively recent comers. Before 1884 Germany did not possess a single subject in Africa. Their ambitions, however, were well known. In 1879 Ernst von Weber had strongly advocated the acquisition of Delagoa Bay and the economic penetration of the Transvaal and British South Africa. Sir Donald Currie, speaking with knowledge, subsequently stated that: 'The German Government would have secured St. Lucia Bay and the coastline between Natal and the possessions of Portugal had not the British Government telegraphed instructions to dispatch a gun-boat from Cape Town with orders to hoist the British flag at St. Lucia Bay.' Within a very few years, however, Germany had, with the entire assent of the British Government, established

<sup>1</sup> Address by Sir Percy FitzPatrick to the members of the *Empire Parliamentary Association* on 9th July 1919. The proceedings were private, but Sir Percy emphasized the fact that he had repeated the statement 'in public many times'; once at least in his place in the South African Parliament.

herself, and at a single bound had leapt into the position of the third European power in Africa. The establishment of the German Protectorate over Damaraland and Namaqualand; the annexation of Togoland and the Cameroons; the foundation of German East Africa, with its immense significance from the point of view of strategy, of man power, and of raw material—all this was the work of less than two years (1884-5).

Delagoa  
Bay

Much older than the German Empire in Africa, older than the British, and older even than the Dutch, was that of Portugal. Delagoa Bay, in a strategical sense the most important portion of the Portuguese possession, could have been acquired by the British Government in 1872 for the trifling sum of £12,000. The Government of the day (Gladstone's) grudged the money, and, in the words of a competent writer, 'their ill-starred economy has proved one of the most unfortunate and costly acts in the whole of our South African administration.'<sup>1</sup> The foreign element in South Africa would have been far more formidable than it was but for the foresight and enterprise of Cecil Rhodes. In 1888 Rhodes induced the Governor of Cape Colony to conclude a Treaty with Lobengula, chief of the Matabeles, affording him protection in return for a promise not to alienate any portion of his country without the cognizance of the British Government.<sup>1</sup> A year later the British South Africa Company received from the Crown a Charter authorizing it to develop the country which lies north of Bechuanaland and of the Transvaal and west of Portuguese East Africa. That territory, together with large dominions subsequently acquired in the north, the Company still rules under the name of Rhodesia.<sup>2</sup>

Cape  
Colony  
under the  
Dutch

We are, however, anticipating the sequence of events. 'In South Africa', wrote Professor Egerton, 'more perhaps than in any other portion of the world, there are common questions of general interest which can only be decided with safety by a general authority expressing

<sup>1</sup> *The Government of South Africa*, p. 31.

<sup>2</sup> See p. 293.

the considered judgement of a united South Africa.'<sup>1</sup> That is true; but events had led to the establishment not of one but of four separate and self-governing colonies under the British Crown. Of these only one—Natal—was British in origin. From the middle of the seventeenth century down to the close of the eighteenth the parent Colony—the Cape of Good Hope—was a possession of the Dutch East India Company. Occupied by the Dutch in 1652 Cape Colony was regarded by them simply as an outpost of the Dutch East Indies, and as such was placed under the Governor-General and Council of India and administered from Batavia. For a century and a half it was little more than a port of call for Dutch East Indiamen. Previous to its establishment the voyages from Europe to the East generally meant a mortality of thirty per cent. among the crews. The Cape Colony, therefore, was utilized as a half-way hospital, and not only did it thus help to cure the sick but, by the supply of fresh vegetables, it contributed effectually to ward off the attacks of scurvy and similar diseases and to diminish the mortality therefrom. In 1795 the United Provinces were conquered by the French, and the Stadtholder, who found refuge in England, ordered the Governor of Cape Colony to admit British troops 'who come to protect the Colony against the invasion of the French'. Restored to the Batavian Republic by the Treaty of Amiens (1802) the Colony was reoccupied by a British force under Sir David Baird in 1806, and was finally retained, on terms financially acceptable to the Dutch, by the Treaty of Paris in 1814. The moral to be drawn from the history of the Cape Colony, under the rule of the Dutch East India Company, is summarized in a pertinent passage by Sir Charles Lucas:

'This story . . . seems to teach three lessons. . . . It is men who make States, that is the first lesson. The Netherlands could never spare men and women enough to South Africa. Had the number of Dutchmen who emigrated to the Cape

<sup>1</sup> *Op. cit.*, p. 74.



been multiplied four or fivefold, a strong community would have been formed, and the colonists would soon have shaken off the mischievous restrictions imposed by the company. The story is a warning, in the second place, that trading companies are meant to trade and not to rule. Companies may with advantage plant a settlement and take charge of it in its infancy, but after a while company rule is out of place and out of time. This applies to all kinds of dependencies, but most of all to those colonial communities where the ruled, or many of them, are of the same race as the rulers. A country where European settlers have made a permanent home cannot, after a certain time, be healthily governed on the principle of furnishing a regular dividend to shareholders in Europe. The third lesson is that it is impossible to govern aright one part of the world, when the governors' eyes and minds are perpetually fixed on another. "Where your treasure is, there will your heart be also." The treasure of the Netherlands East India Company was in the East. Their hearts, if they had any, their heads, while they had any, were there also.<sup>1</sup>

British  
Rule in  
South  
Africa

The Peace of 1814 opened a new era in South Africa, but during the whole period between 1814 and 1899 there was constant friction between the British Government and the Dutch settlers. The Dutch farmers, living primitive and isolated lives on their huge stock farms, were intensely conservative in temper, and very impatient of governmental control—particularly if that control took the form of interference between themselves and the natives upon whom they relied for labour. The zeal of the English Government for improved administration, still more the zeal of the British missionaries on behalf of the natives, may perhaps have outrun their discretion. Yet the services rendered to South Africa by such men as Moffat, Livingstone, McKenzie, and Maples cannot be over-estimated by the impartial historian. Those services were not, however, appreciated by the Dutch farmers whose cup of indignation overflowed when, by the Act of 1833, their slaves were emancipated. That

<sup>1</sup> *Historical Geography of the British Colonies*, p. 107.

the administration of this Act involved a grievance and some actual hardship to the Boers cannot be denied. But the emancipation of the slaves was only the last and most bitter in the long series of offences which they alleged against their British rulers. They resolved therefore to quit the land of tyranny and seek freedom in the vast hinterland of South Africa. The great Boer trek (1836-40) is one of the turning-points in South African history; it led to the establishment of two Dutch communities, one in the Transvaal, and the other in the Orange Free State, and, for many years, still further complicated the relations between the two chief European races in South Africa.

The policy pursued by the British Government towards the Transvaal and the Orange Free State was, to the last degree, vacillating. Two possible alternatives presented themselves: either frankly to have acknowledged the independence of the Boer Republics; or firmly to have insisted that go where they might the Boers must remain subjects of the British Crown. Neither policy was consistently pursued. In 1848 Sir Harry Smith, the English Governor of Cape Colony, issued a proclamation to the effect that 'the whole territory between the Orange and Vaal Rivers as far east as the Drakensberg was to be under the sovereignty of the Queen'. The Dutch settlers protested, and in 1852 Great Britain by the *Sand River Convention* conceded to the Dutch settlers beyond the Vaal River 'the right to manage their own affairs, and to govern themselves without any interference on the part of Her Majesty the Queen's government'. Two conditions, however, were made: that the Transvaal was to be open to all comers on equal terms, and that no slavery was to be permitted or practised. Two years later, by the *Bloemfontein Convention*, a similar concession was made to the Boers of the Orange Free State.

Britons  
and Boers

The policy thus initiated was maintained for the next twenty years. Meanwhile, a good deal had happened. In 1824 a handful of English colonists had established Natal

themselves at Port Natal. For some years their existence was seriously menaced by their Boer neighbours to the north and west of the Drakensberg range. But in 1843 the Boers withdrew, and Natal was formally proclaimed to be a British Colony. In 1868 the Boers on the Orange River became involved in a dispute with the Basutos, as a result of which the Basutos petitioned for British protection, and, in 1869, British sovereignty was proclaimed over Basutoland. In 1871 Griqualand West was similarly annexed. These annexations possess special significance. They indicated that the policy of inertia pursued for a full generation in South Africa was abandoned. A new temper was stirring at home and was reflected at the circumference of the Empire. Especially was it noticeable in Africa. The motives which inspired the new movement were, as usual, mixed. The acquisition of Griqualand brought into English hands the diamond fields of the Kimberley district, and this in turn meant the introduction of a new strain into the social life of South Africa. Henceforward, the digger and the capitalist, restless and ambitious, planted themselves alongside the Dutch farmers whose one anxiety was to stand in the ancient ways. Between the new immigrants and the old settlers there was no community of outlook, and no sympathy. Hence the troubles that ensued.

Annexation of the Transvaal

In 1876 the Boers of the Transvaal were threatened with annihilation at the hands of their native neighbours. Sir Theophilus Shepstone, the Secretary for Native Affairs in Natal, was commissioned by Lord Carnarvon, then Secretary of State, to inquire into the disturbances, and was authorized at his discretion and provided it were desired by the inhabitants 'to annex to the British dominion all or part of the territories which formed the scene of his inquiry'. Armed with this authority and convinced that annexation alone could save the Boers from their native enemies, Shepstone in 1877 took over the administration of the Transvaal in the Queen's name. The British Government now found itself face to face

with the Zulus. The war which ensued (1878) began with a grievous disaster to British arms, but ended in the inevitable defeat of the Zulus.

The Boers, relieved of the danger which had threatened their existence, now demanded the retrocession of the Transvaal against the annexation of which they had from the first protested. Sir Garnet Wolseley was sent out in June 1879 to take over as High Commissioner supreme civil and military command in the Transvaal. Wolseley proclaimed that it was the determination of Her Majesty's Government that the Transvaal should remain for ever 'an integral portion of Her Majesty's dominions in South Africa', but conferred upon the Boers a Crown Colony constitution. Encouraged by a change of government in England (1880) the Boers responded by a declaration of independence. War ensued, and a series of reverses—at Laing's Nek, Ingogo, and Majuba Hill—was followed by the conclusion of a convention at Pretoria which acknowledged the right of the Boers to complete self-government under the suzerainty of the Queen. Three years later (1884) this convention was amended by the Treaty of London, which, while reserving to the Crown the control of external relations, deleted all reference to the suzerainty of the Queen, and acknowledged the South African Republic.

The set-back to British prestige and supremacy in South Africa proved to be temporary. In 1884 there began, as we have seen, a scramble for Africa among the European Powers. In 1885 a British Protectorate was established over Bechuanaland, partly no doubt with a view of preventing over-close relations between the Boer Republics and the recently established German colonies of Namaqualand and Damaraland (German South-West Africa). In the same year a Charter was granted to the Royal Niger Company, which established a Protectorate over the Niger territory on the west coast. But chartered companies and Protectorates alike represent, as a rule, somewhat transitory phases of develop-

British  
expansion in  
Africa

ment, and in 1900 Nigeria was annexed to the Crown. On the east coast the Chartered Company of East Africa (1888) prepared the way in similar fashion for the direct sovereignty of the Crown (1896). In 1889 the Chartered Company of South Africa was, as we have seen, incorporated and started on its conquering and civilizing mission, establishing its sovereignty in no long time over the vast territory which stretches from the Limpopo in the south to Lake Nyassa on the east and Lake Tanganyika on the north.

About the same time (1890) Portugal was induced to renounce all rights over the Hinterland which separated its possessions in the west (Angola) from Mozambique and Portuguese East Africa. In this way the two Boer Republics were virtually encircled by British territory.

The  
Transvaal  
Gold  
Fields

Meanwhile, in the Transvaal itself an event of first-rate importance had taken place. Valuable gold mines were discovered in 1886 on the Witwatersrand, and the discovery attracted a crowd of adventurers who had as little in common with the Boers of the Transvaal as had the diamond diggers of Kimberley with the farmers of the Orange Free State. Consequently, the newly founded city of Johannesburg, with its new Chamber of Mines, soon found itself in conflict with Pretoria and the Volksraad: The new-comers, or *Uitlanders*, demanded political rights commensurate with their contribution to the wealth of the community. The Boer Government, at that time dominated by President Kruger, refused to grant them. In 1895 Cecil Rhodes became Prime Minister of the Cape Colony, and in December of that same year the Uitlanders of the Transvaal attempted to take by force what had been denied to their arguments. Dr. Jameson, an intimate friend of the Premier of Cape Colony, and himself the administrator of the British South Africa Company, foolishly attempted to raid the Transvaal territory with an armed force. The force, commanded by Jameson, was surrounded by the Boers at Krugersdorp and forced to surrender.

The  
Jameson  
Raid

Plainly, things were hastening towards a critical denouement in South Africa. In 1895 Mr. Chamberlain accepted office in Lord Salisbury's Ministry as Secretary of State for the Colonies, and in 1897 Sir Alfred (afterwards Viscount) Milner was appointed Governor of Cape Colony and High Commissioner of South Africa. In the same year Mr. Chamberlain addressed to the High Commissioner an important dispatch setting forth in detail the grievances of the Uitlanders against the Transvaal Government, and at the same time instructing him to raise specifically the question of the status of the Transvaal under the Convention of 1884. The terms of that Convention were admittedly ambiguous; the renunciation of suzerainty was a sentimental blunder, and recent events rendered it imperative, if grave consequences were not to ensue, that the situation should be cleared up. The Transvaal Government attempted, not unnaturally, to use Jameson's blunder for the purpose of securing a revision in their favour of the terms of the Convention of London, but Mr. Chamberlain was adamant against any attempt on the part of the Dutch Republic to assert a status of complete sovereignty and independence. Meanwhile, things could not remain as they were at Johannesburg. In April 1899, Sir Alfred Milner forwarded to the Queen a petition, signed by 21,000 British subjects in the Transvaal, praying that the Queen would make inquiry into the grievances of which they were victims, and in particular their exclusion from all political rights. A month later Mr. Chamberlain expressed in the House of Commons his complete sympathy with the terms of the petition. Negotiations between the two parties ensued, and in June a Conference took place at Bloemfontein between President Kruger and Sir Alfred Milner at which the latter vainly attempted to persuade the President to make some concession to the Uitlanders. The situation became so menacing that reinforcements were dispatched from England to the Cape, but in numbers insufficient to assert the British claims, though more than

sufficient to provoke the apprehensions of the Boers. In October 1899, the two Dutch Republics demanded the immediate withdrawal of the British troops, and the submission of all the questions at issue to arbitration. To concede the latter claim would have been to acknowledge the equality and sovereign status of the Transvaal Government. On the implicit refusal of the demand the two Dutch Republics declared war (10th October). The war followed the usual course of wars waged by this country: inadequate preparation; initial reverses; ultimate victory; but with its varying fortunes this narrative is not concerned. In May 1902 peace was concluded at Vereeniging, and with the conclusion of peace the long contest for supremacy between the two European races in South Africa came to an end. The Boers frankly accepted defeat; the British used their victory not merely with moderation but with generosity. After the annexation of the two Burgher States to the Crown matters began to settle down so rapidly that it was deemed possible to confer responsible self-government upon the Transvaal in 1906, and upon the Orange River Colony in 1907.

Federa-  
tion or  
Union?

In South Africa, however, as in Canada and Australia, the attainment of responsible government was but the prelude to a further constitutional development. Between the four self-governing colonies—Cape Colony, Natal, the Transvaal, and the Orange River Colony—there was much in common: common interests to promote; common difficulties to face; common dangers to avert. But the four colonies, though the most important, were not the only possessions of the Crown in South Africa. The seven others were: Basutoland, the Bechuanaland Protectorate, Swaziland, Nyasaland, and Rhodesia, Southern, North-Western, and North-Eastern. Each of these constituted a separate administrative area, and of their several interests and needs any scheme of government for South Africa, though designed primarily with reference to the self-governing colonies, must needs take account.

Four problems, in particular, confronted British statesmanship in South Africa and demanded careful consideration: the position of the native population; the problem of labour for the mines, for industry, and for agriculture; the railway system and railway rates; and, closely connected with the last, the tariff question.

Root  
problems  
in South  
Africa

The glaring disproportion between the European and the aboriginal inhabitants has long been the crux of South African politics. Presenting itself, as we have seen, with varying degrees of intensity in the several colonies the problem has naturally not been treated on uniform lines. In Cape Colony, for example, where the proportion of white inhabitants to coloured is just about one to four, the treatment of the natives has been far more 'generous' than in Natal, where the proportion is roughly one to ten. Cape Colony has based its policy on the formula: 'Equal rights for all civilized men.' It has consistently acted on the supposition that 'the problem will find its solution in narrowing the gulf which divides the races'.<sup>1</sup> Natives were admitted to the franchise on precisely the same terms as whites, and, in 1903, nearly fifty per cent. of the revenue raised by native taxation was devoted to expenditure on native education. It was otherwise in Natal and the inland colonies. Natal was at the same time raising 43.05 pence per head of the native population and spending 1.9 pence; the Orange River Colony was raising 43.6 pence and spending 1.8; the Transvaal was raising no less than 82.03 and spending only 1.5. In none of these colonies were natives admitted to the franchise or to any sort of equality in social or political conditions. The prevalent sentiment in these colonies is in fact embodied in the blunt declaration of the republican Grondwet that 'the people will not tolerate equality between coloured and white inhabitants either in Church or State'.<sup>2</sup> Such divergence of temper and policy might

<sup>1</sup> *The Government of South Africa*, p. 128 (an anonymous work of great value published by the Central News Agency, South Africa, 1908).

<sup>2</sup> *Ibid.*, p. 137.



seem to have dictated a federal as opposed to a unitary form of constitution, and but for the overwhelming force of the argument derived from a consideration of the railway rates question and the tariff question, might possibly have been permitted to do so.

Closely connected with the native problem is that of the treatment of Asiatic immigrants. The whole labour problem in South Africa has, ever since the emancipation of the slaves, and more particularly since the discovery of diamonds and gold, been one of extraordinary complexity. And it is further complicated by the caste system. That system virtually forbids the white man to undertake unskilled labour, however small his capacity for anything higher. Industry, however, is tending to outgrow the local supply of coloured labour, and inevitably, therefore, there has arisen a demand for coloured immigration. The Natal plantations and the Transvaal mines alike rely in large measure upon Asiatic labour. Cape Colony has never resorted, since the British occupation, to a similar expedient; yet for obvious reasons it is deeply concerned in the policy of its neighbours towards this and similar questions. The interests of white South Africa clearly demand, therefore, if not a uniform treatment, at least a common consideration of these persistent problems.

Earlier  
schemes  
of Federa-  
tion

Long before they had become so insistent as they now are the disadvantages of separation had become apparent to the more far-seeing of English administrators in South Africa. Among these one of the most vigorous and enlightened was Sir George Grey. It was during his administration (1854-61) that Cape Colony was endowed with an elected Legislature, but Grey's vision extended far beyond any such constitutional expedient. Looking beyond the vacillating policy hitherto pursued by Great Britain in South Africa, he saw that the only possible path of safety lay in some form of federation. The State Paper in which, in 1858, he submitted his views to the Home Government is one of the ablest documents in the

history of our Colonial Empire.<sup>1</sup> Grey had the support of the Boers of the Orange River Sovereignty. Their Volksraad resolved in 1858 'that a union or alliance with the Cape Colony, either on the plan of federation or otherwise, is desirable'. The only reply of the Colonial Office was to recall Grey for exceeding his instructions. He was restored by the personal intervention of the Queen, but he returned to Cape Town with tarnished prestige and with gravely impaired authority. Had the Home Government grasped the problem as Sir George Grey grasped it, had they even had the sense to trust 'the man on the spot', the whole subsequent course of South African history might have been different. Mr. F. W. Reitz, afterwards the Transvaal Secretary of State, wrote to Grey in 1893: 'Had British Ministers in time past been wise enough to follow your advice, there would undoubtedly be to-day a British dominion extending from Table Bay to Zambesi.'<sup>2</sup> But in those days the Manchester School was in the ascendant; in that school there was no room for statesmen of Grey's vision; the weary Titan was tired of the whole 'burden' of colonial establishments, and was looking forward to the happy day when 'those wretched Colonies would no longer hang like millstones round our necks'.

For the time being, therefore, the project was dropped. It was revived by Lord Carnarvon, who, in 1874, became Secretary of State for the Colonies in Disraeli's Ministry. Carnarvon was the minister who had been officially responsible for the enactment of the Federal Constitution for British North America, and was burning with the desire, intrinsically commendable, to confer a similar boon upon South Africa. But the moment was inopportune and the means adopted to commend the project to South African opinion were singularly unfortunate. Only in 1872 had Cape Colony been advanced to the dignity of

The Earl  
of Car-  
narvon

<sup>1</sup> H. C. Papers 216 of 1860. Dispatch from Sir George Grey, dated Capetown, 19 November 1858.

<sup>2</sup> Quoted by Egerton, *Federations, &c.*, p. 71.

'responsible' government; Natal had not yet reached it; the Burgher republics were still in enjoyment of the ambiguous independence conferred upon them in the early fifties. The recent annexation of Griqualand West (1871) further complicated the situation. None of the several communities—English or Dutch—in South Africa desired union with its neighbours and none was prepared to forego any shred of the independence it enjoyed. The fates were not, therefore, favourable to the realization of Lord Carnarvon's far-sighted but premature project.

Nevertheless, the Secretary of State wrote to the Governor of the Cape in 1875 to propose that the several States of South Africa should be invited to a Conference to discuss native policy and other points of common interest, and to ventilate 'the all-important question of a possible union of South Africa in some form of confederation'.<sup>1</sup> The proposal was not welcomed in Cape Colony, and Mr. Froude, the eminent historian, who had been sent out to represent the Colonial Office at the proposed Conference, found his position highly embarrassing both to himself and to his hosts.<sup>2</sup> Froude put his finger with great acuteness upon the root difficulty: 'If we can make up our minds to allow the colonists to manage the natives their own way we may safely confederate the whole country.' Of federation, however, imposed upon them from London, the colonists would hear nothing. The Conference in South Africa never met.

Lord Carnarvon, not to be foiled, invited various gentlemen interested in South Africa to confer with him at the Colonial Office (August 1876). The Cape Premier, Mr. Molteno, happened to be in London but was forbidden by his colleagues to attend; no delegate was present from the Transvaal; and Mr. Brand, President of the Orange Free State (who greatly impressed Froude), attended under strict injunctions from his Volksraad not

<sup>1</sup> Lucas, *op. cit.*, p. 264.

<sup>2</sup> Cf. Paul, *Life of Froude*, c. vii. Eight gentlemen invited to meet him at dinner at Government House refused.

to take part in any negotiations respecting federation, by which the independence of his own State could be endangered. Sir Theophilus Shepstone and two members of the local Legislature represented Natal. As regards federation the meeting was entirely abortive.<sup>1</sup>

Despite this discouragement, Lord Carnarvon sent out to South Africa (in December 1876) the draft of a permissive Confederation Bill, which in the session of 1877 was passed into law by the Imperial Legislature. This enabling Act contained the outline of a complete Federal Constitution. It was for the South African Colonies to fill it in if they would. Lord Carnarvon, while insisting that the 'action of all parties whether in the British Colonies or the Dutch States must be spontaneous and uncontrolled', informed the new Governor of the Cape that he had been selected 'to carry my scheme of confederation into effect'.<sup>2</sup> The man chosen for this high task was one of the most trusted and experienced servants of the Crown, one to whose life-work the confederation of South Africa might form an appropriate and noble crown. It was the expressed hope of his Chief that within two years he would be 'the first Governor-General of South Africa'. The words read ironically, for the reign of Sir Bartle Frere (1877-80) coincided, through no fault of his own, with the darkest chapter in the volume of South African history.

With that chapter we have already summarily dealt. It was not finally closed until the conclusion of the Treaty of Vereeniging. The grant of responsible government to the former Boer republics (1906-7) served at once to accentuate the inconveniences and even the dangers of isolation and to open out the path to some form of association.

Of the causes which induced, in each of the colonies concerned, a more favourable disposition toward the idea of closer union two have been already analysed. Even more insistent though not more persistent were the

Reasons  
for closer  
union

<sup>1</sup> Lucas, *op. cit.*, p. 265.

<sup>2</sup> Egerton, *Federations, &c.*, p. 72.

closely related questions of tariff policy and railway administration. There was the problem also of common defence, not to mention the grave inconvenience, daily more manifest under the new conditions which had obtained since 1902, of a lack of uniformity in law and, still more, in the methods of administering it. A partial attempt to meet the latter difficulty was made in 1905 when the question of establishing a South African Court of Appeal was referred for consideration to the attorneys-general of the four colonies and Rhodesia; but the attempt proved abortive, thus furnishing an additional argument to those who had long been convinced of the difficulty of attaining 'unity in any particular department unless a national government is first created to undertake the task'.<sup>1</sup> The problem of common defence was still more pressing. The coast colonies were wholly dependent for protection upon the Imperial navy: the inland colonies as well as those on the coast relied upon the English garrison for the preservation of order amongst the native peoples when such a task imposed too great a strain upon local resources. In view of their dependence upon the Royal Navy Cape Colony made an annual contribution of £50,000, and Natal of £35,000, towards the expense of maintaining it, and each supported a small force of naval volunteers. The inland colonies contributed nothing. The Imperial garrison was maintained in South Africa, less for local reasons than on larger grounds of imperial policy; consequently no contribution towards its upkeep was made or expected. The cost to the taxpayers of the United Kingdom was, in 1907, £2,500,000, in addition to the charge for interest upon a capital sum of £6,500,000 spent upon cantonments and other establishments.<sup>2</sup> With a view to the improvement of the means of internal defence a conference of the four colonies and Rhodesia met at Johannesburg in 1907, and an admirable scheme was drafted; but the difficulties in the way of its adoption in the several colonies only

<sup>1</sup> *Government of South Africa*, p. 60.

<sup>2</sup> *Ibid.*, p. 100.

afforded a further illustration of the inconveniences attendant upon constitutional separation.

The necessity for the control of immigration supplied another argument in favour of closer union, but nothing did so much to convince the recalcitrant as the difficulty of finding an equitable solution of the tariff problem and the apparently inextricable confusion arising from the separate State ownership and management of the railways.

'I can come to no other conclusion', wrote Mr. I. Conacher, whose Report on the prae-union railway system is the *locus classicus* on the subject, 'than that under present conditions no settlement of a permanent character can be reached and that any settlement that may now be found practicable would, while it lasted, have a tendency to delay further extensions of the railways not of a purely local character through fear of reopening old questions that had been settled.'<sup>1</sup>

All the railways in South Africa were State railways ; private enterprise cannot be relied upon to provide means of communication in a country of vast extent, sparsely peopled and where the supply must necessarily be always somewhat ahead of the demand. But South Africa by no means escaped the disadvantages attaching, as the Australian Colonies have also learnt to their cost, to State ownership and State management. Nor were those disadvantages diminished by the fact that there were four States and four railway systems. Moreover, in two States—Cape Colony and Natal—the possibility of maintaining financial equilibrium depended upon the revenue from railways, and that revenue depended mainly upon the traffic between the coast colonies and the Witwatersrand. There is, therefore, little cause to wonder that one of the most important and elaborate chapters in the *South African Act* is that which is devoted to 'Finance and Railways'.

The two problems were inextricably bound up with each other : and both had provided abundant oppor-

<sup>1</sup> Quoted, *ibid.*, p. 208.

tunities for friction between State and State. For many years the inland States were entirely at the mercy of Cape Colony and Natal. These coast colonies controlled the import trade and used their power in a manner which Mr. Brand does not hesitate to stigmatize as 'unscrupulous'.<sup>1</sup> The whole of the import duties derived from goods consigned to the Orange Free State and the Transvaal went into the Treasuries of the coast colonies. In 1884 Cape Colony granted a rebate to the inland colonies, in 1886 Natal followed suit, and in 1889 a Customs Union was concluded between Cape Colony and the Orange Free State to which Basutoland and the Bechuanaland Protectorate shortly afterwards adhered.

Attitude  
of the  
Boers

The iron of injustice had, however, entered into the soul of the Boers, and Paul Kruger, President of the Transvaal Republic, was determined to get even with the coast colonies for the greed they had displayed as long as they were masters of the situation. Lord Kimberley's failure to acquire Delagoa Bay gave Kruger his chance, and he used it to the full. Delagoa Bay is forty miles nearer to Johannesburg than is Durban, and still nearer than are the Cape Colony ports of East London and Port Elizabeth. The line from the Transvaal to Delagoa Bay was largely controlled by the Netherlands Railway Company, in other words by the Transvaal Boers, and Kruger resolved, therefore, to divert traffic to the Delagoa Bay route. He raised the rates on the forty miles of Transvaal territory over which the Cape-Free-State railway passed on its way to the Rand higher than those on the whole length of the Delagoa Bay railway between Johannesburg and the coast. So successful was this unscrupulous device that by 1908 the Cape ports which in 1894 had got 80 per cent. of the traffic, were getting only 11 per cent., that Durban's share was steadily declining, and that Delagoa Bay had secured no less than 67 per cent.<sup>2</sup>

Kruger's animosity was directed, however, not only against the coast colonies, but still more against the

<sup>1</sup> *Op. cit.*, p. 15.

<sup>2</sup> Brand, *op. cit.*, p. 20.

mining community of the Rand. In order to impose the greatest inconvenience and damage upon them, the goods traffic was shunted and otherwise delayed at Viljoen's Drift, at the Transvaal frontier. To meet this menace the mine owners organized a service of ox-wagons between the Drifts and Johannesburg. Kruger, thereupon, closed the Drifts, and feeling ran so high that in 1895 an outbreak of war was barely averted. It had been better perhaps if the war had not been postponed; for on the point then at issue the Dutch both of the Orange Free State and of Cape Colony were at one with the oppressed Uitlanders of the Transvaal. Mr. Schreiner, the Dutch Premier of Cape Colony, promised indeed that the Colony would bear half the cost of the war, should the Imperial Government find it necessary, in order to enforce their claims, to resort to it. Mr. Chamberlain dispatched an ultimatum to President Kruger calling upon him immediately to reopen the Drifts, and Kruger, whose preparations for war were not quite complete, obeyed. The incident is, nevertheless, admirably illustrative of the intimate connexion in South Africa between railway administration and high policy.

The destruction wrought by the South African War naturally intensified all the fiscal and economic problems which had previously confronted the several Colonies. While the Transvaal and the Orange River Colony were under Crown Colony Government Lord Milner took the opportunity of amalgamating the two railway systems, to the obvious advantage of both and in particular of the Orange River Colony which thus obtained a share in the increasing prosperity of the Delagoa Bay railway. Already, in 1901, Lord Milner, impelled by the urgent necessity of getting the Rand mines to work again, and, faced by the shortage of labour, concluded an agreement with the Portuguese Government. The agreement stipulated for the provision of recruiting facilities for native labour in Portuguese territory, and, on the other side, that railway rates should not be altered to the



detriment of Delagoa Bay. The arrangement, concluded by the High Commissioner without consultation with the Cape Colony or Natal, was little to the liking of those communities. The competition of Delagoa Bay was, as already observed, seriously affecting their traffics and therefore their revenues, and the incident consequently supplied yet another to the rapidly accumulating reasons in favour of a unification of interests.

Lord  
Milner's  
'parting  
word'

Just before his final departure from South Africa Lord Milner addressed to a conference at Johannesburg his 'parting word' on this question. Nor did that word lack emphasis. A great proconsul whose name will ever be associated with one of the most memorable chapters in South African history put on record his 'conviction of the supreme importance of trying to get over the conflict of State interests in the matter of railways'.

'Under the present system', he said, 'of four separate administrations the benefit to the country generally of any new line is constantly obscured and thrown into the background by considerations of its effect upon the comparative profits from the railways of the several States. . . . That line may be indefinitely blocked because it is going to take money out of the pocket of a particular administration. If there were only one pocket this obstacle would never arise. . . . We have got into a rut, and we shall never get out of that rut until there is community of interest in all the main railways of South Africa.'

The seed sown by Lord Milner fell on prepared ground. Every responsible statesman in South Africa, to whichever of the States he might belong, realized that they were on the brink of a crisis hardly inferior to that of 1899. It was precipitated by the action of the Transvaal Government. After the war, the Customs Union of 1899 was enlarged to include the Transvaal and Southern Rhodesia, but the severe depression which ensued necessitated the raising of a larger revenue from this source. A conference was consequently held at Maritzburg in the spring of 1906 to consider the question. Some measure

of agreement was ultimately reached, but with the greatest difficulty, for the Transvaal naturally objected to a tariff framed primarily in the interests of the coast colonies. No sooner, however, did the Transvaal attain to Responsible Government than it notified the other Governments of its intention to withdraw from the Customs Union.

This action compelled the immediate consideration of the larger issue. Was South Africa to face the certainty of commercial chaos, the not remote possibility of an inter-colonial war? The interests of the several Colonies were not, on the narrower view, identical. The Transvaal might have prospered in isolation, protecting itself against its neighbours by a tariff, and relying upon the non-British port of Delagoa Bay. It might have extended its protection to the Orange River Colony. What then would have been the plight of the coast colonies already severely depressed by the aftermath of war? The question of closer union could no longer be deferred.

Opinion had been rapidly maturing. Lord Milner had called to his aid a brilliant staff of young men, mainly Oxford graduates of distinction, who in the midst of other work, administrative and journalistic, set themselves deliberately to prepare the way for the federation of the South African Colonies. A Closer Union Society, with many branches, was formed to explore the whole subject in a scientific spirit, and under its auspices was published in 1908 a work entitled *The Framework of Union* which, in addition to an historical account of the evolution of federal unity in Canada and Australia, contained an analytical comparison of the constitutions of the United States, Canada, Australia, Germany, and Switzerland. Compiled primarily with a view to propaganda in South Africa the work makes an exceedingly valuable contribution to the history of Federalism in the modern world. Lord Selborne, who, in 1905, succeeded Lord Milner as High Commissioner, published in 1907 a *Review of the Mutual Relations of the British South African*

Educational  
propaganda

*Colonies*—a masterly State paper comparable in significance with Lord Durham's historic *Report* on Canada. The case for closer union was there stated not only with unique authority but with compelling closeness of argument. Lastly, in final preparation for the deliberations of those who were to be actually responsible for the framing of a constitution for South Africa, the indefatigable members of the *Closer Union Society* published two portly volumes entitled *The Government of South Africa*. This invaluable work provides at once a treatise on Political Science, a searching analysis of existing conditions in South Africa and a manual of constitutional procedure for the Union.

Union or  
Federal-  
ism

Union had now become the avowed aim of the reformers. Starting with a preference for the federal form of government, already, as we have seen, adopted in the two greatest of the British Dominions, the best opinion in South Africa moved with great rapidity and remarkable unanimity towards the adoption of an even closer form of union. To this conclusion critics were impelled by considerations the force of which has been discussed in preceding paragraphs. The most superficial acquaintance with South Africa will suffice for an appreciation of the basic truth that the territorial divisions in that country run on lines which are artificial and accidental, and that the fundamental division is between race and race. 'The situation', wrote Lord Selborne, 'is startling, because it is without precedent. No reasoning man can live in South Africa and doubt that the existence *there* of a white community must, from first to last, depend upon their success or failure in finding a right solution of the coloured and native questions.' The solution could be best explored in a united parliament. 'If all South Africa were united under one Parliament . . . such a Parliament would beget, what cannot exist without it, an informed public opinion on South African affairs. It would bring into existence a class of men throughout the country accustomed to reflect on questions as they

affected it in every part.' Federalism might possibly have availed, though less effectively, for this. The paramount and finally compelling reason for preferring union was provided by the interwoven problem of tariffs and railway rates.

In May 1908 a conference met at Pretoria to try and find a way out of the tangle. Hardly had the delegates got to business before they realized that under the existing conditions no way could be found. They began therefore by passing a unanimous resolution pledging their several Governments to summon a National Convention for the purpose of drafting a constitution for South Africa. For the primary problem submitted to the Conference no solution could be discovered. The maritime colonies refused to allow the Transvaal to adjust railway rates; the Transvaal would not assent to any increase in customs duties beyond the scale of 1906. The deadlock was complete, but all parties agreed to an *ad interim* continuation of the agreement of 1906. If the Constitutional Convention failed, war was plainly in sight.

The best men in South Africa were resolved that it should succeed. On 12 October 1908 the Convention met at Durban. It consisted of thirty-three delegates elected by the four Parliaments. The proceedings were wisely conducted behind closed doors, but Mr. R. H. Brand who acted as secretary to the Transvaal delegation has, within strict limits of discretion, thrown some light upon its procedure and, in particular, has given an interesting account of its personnel. 'The Federal Convention of America was remarkable for the large proportion of university graduates;<sup>1</sup> the Australian Convention was particularly rich in constitutional lawyers; the outstanding characteristic of the Durban Convention was, according to Mr. Brand, 'the preponderance of the farming element'. About one-third of the delegates were 'farmers pure and simple', several others were largely interested in farming; of the rest there were 'about ten

Constitu-  
tional  
Conven-  
tion

<sup>1</sup> Twenty-nine out of fifty-five.

lawyers, two or three men connected with commerce and mining, two journalists, and three ex-officials'.

Draft Bill      Rapid progress was made during October at Durban, and in December the Convention resumed its sittings at Cape Town where, by the end of the first week in February (1909), a draft Bill had been completed for submission to the several Parliaments. On the advice of their trusted leaders the Transvaal Parliament agreed to the draft without amendment. There was no such unanimity in the other Parliaments. The Boers at Bloemfontein raised the burning question of 'equal rights' and equal values to be attached to votes in urban and rural constituencies. The Parliament at Cape Town could neither abandon its own position as to the political equality of whites and natives, nor impose its views upon its neighbours. Natal, proud and tenacious of its 'English' character, was fearful lest union might involve its absorption into a 'Dutch' South Africa and would have preferred a federal scheme. Subject, however, to several amendments the draft Bill was approved.

After the consideration of the draft Bill by the several Parliaments the Convention resumed its sittings—this time at Bloemfontein. The main stumbling-block was the variety of electoral qualifications in the different colonies. Proving to be insuperable, the difficulty was, as will be seen later, evaded by accepting the existing franchise in each colony. The Bill as amended at Bloemfontein was then submitted to the Legislatures in the Cape Colony, the Transvaal, and the Orange River Colony, and to the people by referendum in Natal. By June 1909 it had been ratified by all the constituent colonies; it encountered no serious difficulties in the Imperial Parliament, and on 20 September 1909 the Bill 'to constitute the Union of South Africa' received the Royal Assent, and took its place on the British Statute Book as 9 Edw. 7, ch. 9.

The genesis, the progress, and the achievement of the South African Union constitute one of the most memorable incidents in the political history of the modern

world. Mr. Balfour spoke the thoughts of his countrymen and almost certainly anticipated the verdict of history when he said in the House of Commons: 'This Bill, soon I hope to become an Act, is the most wonderful issue out of all those divisions, controversies, battles and outbreaks, the devastation and horrors of war, the difficulties of peace. I do not believe the world shows anything like it in its whole history.'

It remains to examine some of the outstanding characteristics of the Constitution which had thus come to the birth.

Subject, of course, to the paramount authority of the Crown, the Union Legislature is a sovereign body, unfettered by any limitations imposed upon it in the interests of the provinces, and free to amend or repeal (subject to certain temporary provisions) any clause of the Constitution. In brief, the South African Parliament has not only legislative but constituent authority. The Constitution itself is consequently not rigid but flexible. This at once and widely differentiates the South African Constitution and its Legislature from the Constitutions and Legislatures of the Canadian Dominion and the Australian Commonwealth, not to add that of the United States of America. Flexible constitutions and sovereign legislatures are in fact incompatible with Federalism. In both respects South Africa enjoys the advantages (but may also incur the dangers) of Unitarianism. It is proper to add that the powers here ascribed to the Union Legislature are subject to two limitations, the one temporary, the other permanent, prescribed in § 152 as follows:

Parliament may by law repeal or alter any of the provisions of this Act: Provided that no provision thereof, for the operation of which a definite period of time is prescribed, shall during such period be repealed or altered: And provided further that no repeal or alteration of the provisions contained in this section, or in sections thirty-three and thirty-four (until the number of members of the House of Assembly<sup>1</sup>

<sup>1</sup> These prescribe the number of members to be elected (a) at the first election; (b) subsequently.

Characteristics of the Constitution

(a) A Sovereign Legislature

(b) Amendment

has reached the limit therein prescribed, or until a period of ten years has elapsed after the establishment of the Union, whichever is the longer period), or in sections thirty-five and one hundred and thirty-seven,<sup>1</sup> shall be valid unless the Bill embodying such repeal or alteration shall be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament.

(c) Quali-  
fications  
of voters

Section 35 deals with the qualification of electors and embodies the compromise arrived at, as we have seen, after infinite trouble. To have attempted to prescribe a uniform franchise throughout the Union would unquestionably have wrecked the whole scheme. Neither in the Cape Colony itself, nor in England, would public opinion have permitted the disfranchisement of the coloured voters. No one of the other three colonies would have enfranchised them; nor could Cape Colony, with its colour equality, have adopted the manhood suffrage on which the Transvaal relied. There was nothing for it, therefore, but to leave these difficult questions for the future to settle. Accordingly, clause 35, and its corollary, ran as follows:

‘1. Parliament may by law prescribe the qualifications which shall be necessary to entitle persons to vote at the election of members of the House of Assembly, but no such law shall disqualify any person in the province of the Cape of Good Hope who, under the laws existing in the Colony of the Cape of Good Hope at the establishment of the Union, is or may become capable of being registered as a voter from being so registered in the province of the Cape of Good Hope by reason of his race or colour only, unless the Bill be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament.

<sup>1</sup> Section 137 refers to equality in the use of the English and Dutch languages.

' 2. No person who at the passing of any such law is registered as a voter in any province shall be removed from the register by reason only of any disqualification based on race or colour.

' Subject to the provisions of the last preceding section, the qualifications of parliamentary voters, as existing in the several Colonies at the establishment of the Union, shall be the qualifications necessary to entitle persons in the corresponding provinces to vote for the election of members of the House of Assembly. . . .'

Following the precedent set with unanimity by all English-speaking communities, and indeed by the civilized world, the Legislature was constituted on the bicameral system ; and was to consist of a Senate and a House of Assembly.

(d) Bicameral Legislature

The Senate was, for the first ten years after the establishment of the Union, to be constituted as follows: (a) eight Senators to be nominated for a term of ten years, by the Governor-General in Council ; and (b) eight Senators elected by each of the four original provinces. Of the eight to be nominated by the Governor-General four were to be selected ' on the ground mainly of their thorough acquaintance, by reason of their official experience or otherwise, with the reasonable wants and wishes of the coloured races in South Africa '. The eight members representing each province were to be elected, also for ten years, in a joint session of the two Houses of the then existing Colonial Legislatures, on the principle of proportional representation.

The Senate

These provisions were to be in force for ten years only ; after the expiration of that period the South African Parliament might provide for the constitution of the Senate in any manner it might see fit, or it might leave things as they are. In the latter event the elected members of the Senate will in future be chosen by the Provincial Council of each province acting conjointly with the members of the House of Assembly representing that province in the Union Parliament,<sup>1</sup> voting by propor-

<sup>1</sup> The Senate was, according to the terms of the Constitution, dissolved in 1920, but has been reconstituted on the same basis. The Senatorial



tional representation. The temporary character of these provisions was due primarily to the desire to emphasize the essentially unitary character of the Constitution. Further, it was hoped by the leaders of South African opinion that after the lapse of a few years, when experience had been gained as to the working of the new centripetal institutions, and the advantages of union had been more generally recognized, 'provincial feeling would have so far given way to national feeling that it might be possible at the end of that time to make a nearer approach to the unitary principle'.<sup>1</sup> For this, as we must constantly bear in mind, was the goal of the Constitution—not a federal but a united South Africa.

The qualifications for Senatorship are five in number, and, with one exception, of the usual kind. A Senator must (i) be not less than thirty years of age; (ii) possess the qualification of a voter for the election of members of the House of Assembly in one of the provinces; (iii) have resided for five years within the Union; (iv) in the case of an elected Senator, possess real property of the net value of £500; and (v) be a British subject of European descent. The last-mentioned qualification strikes a note which resounds throughout the Instrument, and it was the note which aroused the severest criticism in the Imperial Parliament. It was a tempting opportunity for the leaders of a certain section of British opinion. The protection of the 'native' population in British dominions throughout the world, is, in truth, a peculiar and cherished prerogative of the Imperial Parliament. But even in the exercise of prerogative there must be some consistency. To make an immense and far-reaching concession of self-government, to confer upon a distant dependency the heaviest responsibilities, and to deny to its citizens the right to deal as they will in their

Elections took place on 23 February 1921, following upon the elections for the House of Assembly and resulted as follows: South African Party, 17; Nationalists, 13; Labour 2. Most of the eight nominated members belong naturally to the first party.

<sup>1</sup> R. H. Brand, *op. cit.*, p. 68.

wisdom, or even their unwisdom, with a question of vital and overwhelming importance, is surely the part, not of statesmanship, but of political ineptitude.

It may be repugnant to the canons of doctrinaire democracy to assent to a clause restricting membership of either House to 'men of European descent', but to have insisted on its deletion would have meant the postponement of Union in South Africa to the Greek Kalends. In view of the gravity and complexity of the problems with which South Africa was and is confronted,—problems which a divided South Africa could not face, and even a united South Africa may fail to solve,—it will surely be held that the Imperial Parliament exhibited wisdom in declining to accept the responsibility of such postponement.

The President of the Senate is elected from among the Senators and has a casting vote. Otherwise questions are determined by a simple majority. Twelve members form a quorum. The Governor-General may dissolve the Senate simultaneously with the House of Assembly, or may dissolve the latter alone. But it is provided in the Act (§ 20) that the Senate shall not be dissolved within a period of ten years after the establishment of the Union, and that the dissolution shall not affect the nominated Senators. All Senators, like members of the House of Assembly, receive £400 a year, but forfeit £3 a day for every day of absence during the session. Each House has power to make rules and orders regulating its own procedure.

The relations of the two Houses were defined with precision. Money Bills must originate in the House of Assembly, but it is provided—

Money  
Bills

(1) That 'A Bill shall not be taken to appropriate revenue or moneys or to impose taxation by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties'; and (2) that 'Any Bill which appropriates revenue or moneys for the ordinary annual services shall deal only with such appropriation'.

## UNION OF SOUTH AFRICA

The South African Senate can, like the Australian, reject, but cannot amend, a Money Bill. As regards both Money Bills and ordinary legislation the Senate possesses only a suspensive veto. If a Bill passes the House of Assembly in two successive sessions, and is twice rejected by the Senate, or receives at the hands of the Senate amendments to which the House will not agree, the Governor-General may, during the second session, convene a joint sitting, and the Bill, if then passed by a simple majority of the members of both Houses, shall be deemed to have been duly passed by Parliament, and may be presented for the Royal Assent. In the case of a Money Bill the procedure is even more stringent; for the joint sitting may be convened during *the same session* in which the Senate 'rejects or fails to pass such Bill'.

The solution thus provided for a deadlock is generally similar to that of the Australian Commonwealth Act, but with this essential difference: the Australian Act provides for an appeal to the electorate; in the South African scheme there is no such provision. The difference between the two schemes may perhaps be connected with the more democratic character of the Australian Constitution, and still more directly with the fact that the South African Parliament, unlike the Australian, is competent to amend even the Constitution itself.

The House of Assembly, as constituted by the Act, was to be directly elected on the basis of provinces. Of the 121 original members, 51 were allotted to the Cape of Good Hope, 36 to the Transvaal, and to Natal and the Orange Free State 17 each. The ultimate basis of representation was the number of European male adults in each province, periodically readjusted after each census, but with this provision: that while the numbers might be increased, they could not, in the case of any Original Province, be diminished until the number reaches 150,<sup>1</sup> or until a period of ten years shall have elapsed after the establishment of the Union, whichever is the longer

<sup>1</sup> The number is now (1925) 135.

period. Both the Cape Colony and the Transvaal accepted a smaller representation than that to which they were on the numerical basis entitled, but the representation of the Transvaal has since been increased to fifty. As soon as the total numbers reach 650 the seats are to be redistributed on a strictly numerical basis without regard to provincial divisions. In this, as in other provisions of the Act, we perceive the centripetal ambitions of its authors, temporarily held in check by the prudent anxiety not to wound historical susceptibilities nor to go faster in a unitary direction than public opinion would justify.

With the provisions as to the franchise we have already dealt. The constituencies were to return one member each and were to be delimited by a commission, as far as possible on a strictly numerical basis. To this extent sanction was given to the principle of 'one vote, one value'. That principle was, as we have seen, stoutly opposed, more particularly by the Boer farmers living in the sparsely populated districts of the Cape Colony. To meet their views the Commissioners were directed, in defining the electoral districts, to give due consideration to—

- (a) community or diversity of interests ;
- (b) means of communication ;
- (c) physical features ;
- (d) existing electoral boundaries ;
- (e) sparsity or density of population ;

in such manner that, while taking the quota of voters as the basis of division, the Commissioners may, whenever they deem it necessary, depart therefrom, but in no case to any greater extent than fifteen per centum more or fifteen per centum less than the quota.

Even with these qualifications it was found difficult to obtain the assent of the Cape Colony Parliament to the acceptance of the principle of one vote one value. In order to save a principle to which the Transvaal inflexibly adhered, it was found necessary to sacrifice the idea of

electing the House, like the Senate, on the system of proportional representation. The Boers of the Cape detested this device almost as cordially as that of equal electoral districts. Compromise was, therefore, the only way out.

Qualifica-  
tion of  
members

The Instrument contained the usual provisions as to disqualification of membership for either House, and declared the qualification for a member of the House of Assembly as follows :

He must—

- (a) be qualified to be registered as a voter for the election of members of the House of Assembly in one of the provinces ;
- (b) have resided for five years within the limits of the Union as existing at the time when he is elected ;
- (c) be a British subject of European descent.

The qualification as to European descent represented a concession on the part of the Cape Colony, where natives had hitherto been eligible for election to Parliament, though in fact no native had ever been elected.

The Exe-  
cutive

The provisions in regard to the Executive demand only brief notice. The Executive is, in the English sense, parliamentary and responsible. Formally vested in the Crown, it is practically exercised by an Executive Council composed of the ' King's Ministers of State for the Union '. As in Australia, Ministers must, under the Constitution, be members of one or other House of the Legislature, and by custom they are allowed to sit and speak but not to vote in both Houses. Their number is not to exceed ten, exclusive, in practice, of one or two Ministers ' without portfolio '.<sup>1</sup>

By section 18 Pretoria was designated as the seat of Government of the Union. But by ' Government ' was understood ' Executive Government ', for under section 23 Cape Town was to be the seat of the Legislature. This device, awkward and illogical, is another significant

<sup>1</sup> The delimitation of departmental duties and the allocation of departments to Ministers varies with each administration.

illustration of the spirit of compromise by which the whole Constitution is infused. Similar in origin and in character is the bilingual compromise contained in section 137 which runs as follows :

'Both the English and Dutch languages shall be official languages of the Union, and shall be treated on a footing of equality, and possess and enjoy equal freedom, rights, and privileges ; all records, journals, and proceedings of Parliament shall be kept in both languages, and all Bills, Acts, and notices of general public importance or interest issued by the Government of the Union shall be in both languages.'

This section is among those which cannot be repealed except by the special machinery prescribed in section 152.

Nothing more clearly demonstrates the unitary character of the Constitution than the disappearance of the original Colonies and States. In their place there are four Provinces, for the government of which elaborate provision is made in the Act.

Pro-  
vincial  
Consti-  
tutions

The chief executive officer in each Province is an Administrator who is appointed (for five years) and paid by the Union Government. Legislative authority is vested in Provincial Councils which are to be elected by the same electors, distributed (as far as possible) in the same constituencies, as the Parliament. The number of provincial councillors is to be the same as that of the parliamentary representatives, provided it is not less than twenty-five. The Councils continue for three years and cannot, save by effluxion of time, be dissolved. They have power to make ordinances in relation to any matter delegated to them by Parliament, and to a number of enumerated subjects, such as : direct taxation, local loans, education (other than higher), agriculture (within limits defined by Parliament), roads, markets, and hospitals. Provincial ordinances must receive the assent of the Governor-General in Council, but the Councils may recommend to Parliament the passing of legislation beyond their own competence.

Each Council appoints an Executive Committee of four

persons, who may or may not be members of the Council, to carry on with the Administrator the administration of provincial affairs. As the election of the Executive Committees is under proportional representation it was intended that they should not be partisan in character, but should approximate rather to the standing committees appointed by local councils in this country.

Generally speaking, the Provinces are intended to be, and are, in a position of marked inferiority as compared with that of the Canadian Provinces, and still more with that of the constituent States of the Australian Commonwealth. The authority of the Union Parliament is paramount; it can legislate concurrently on the same topics as the Provincial Councils, and can exercise complete control over the legislation of the latter. Absolute too is the control of the Union Government over provincial finance. No appropriation can be made except on the recommendation of the Administrator, and his warrant is required for all expenditure (section 89). Moreover, in every province there is one auditor, appointed by the Governor-General in Council, and every warrant issued by the Administrator must be countersigned by the auditor who is paid by and responsible to the Union Government.

It is noticeable, however, as an acute critic has pointed out that, complete as is the power of the Union Government over the provinces, no control over the latter is reserved to the Imperial Government. The power of assent or reservation is vested not in the Governor-General, who might in such matters receive his instructions from Whitehall, but in the Governor-General in Council, in other words in the Union Ministry. In the South African Constitution there is not a trace of federal spirit, though some deference is paid to federal forms.

New Pro-  
vinces  
and Terri-  
tories

The Constitution further provides for the admission to the Union of new provinces and territories: in particular of Rhodesia. The King-in-Council is empowered to act on addresses from the two Houses of the Union Parliament,

while Parliament is authorized to alter the boundaries of any province, divide a province into two or more provinces, or form a new province out of provinces within the Union, on the petition of the Provincial Council of every province whose boundaries are affected thereby. Thus far (1925) none of the old provinces has been divided, though the division of Cape Colony is overdue, and no new territories have been admitted. The native territories, Basutoland, the Bechuanaland Protectorate, and Swaziland, remain under imperial control which is exercised by Resident Commissioners under the direction of the High Commissioner, and it is said that the natives, so far from having any desire for admission to the Union, much prefer to remain as they are. In Rhodesia the situation is different. In Southern Rhodesia there is a white community of some 33,000 people surrounded by a vast ocean of natives, numbering 860,000 persons. Responsible Government was in 1923 conceded to Southern Rhodesia, and henceforth the Governor, appointed by the Crown, will act on the advice of a Ministry responsible to the Local Legislature.

No feature of the South African Constitution is more conclusively indicative of its unitarian character than the position assigned therein to the Judiciary. As in England, it is the function of the courts merely to interpret the law, not to act as the guardian of the Constitution. Nevertheless, the Act is exceedingly important as making for simplicity of procedure and uniformity of interpretation. The four independent Supreme Courts, none of which was bound by the decisions of the others, were swept away, or rather were consolidated into one Supreme Court of South Africa. This Supreme Court consists of two divisions: an appellate division, with its head-quarters at Bloemfontein, and provincial and local divisions, exercising jurisdiction within their respective areas. The Supreme Courts of the several Colonies existing at the time of the Union were thus transformed into provincial divisions of the Supreme Court of South

The Judi-  
cature



Africa. From any superior court appeals lie direct to the Appellate Division. From the Supreme Court an appeal lies to the Privy Council only in cases in which the Privy Council gives leave to appeal. In this, as in other important respects, the South Africa Act is at variance with the precedents afforded by Canada and Australia. In Canada appeals lie by right from every Provincial Court to the Privy Council, and in the case of the Commonwealth appeals lie by right and by special leave from all the State Supreme Courts, and by special leave from inferior courts. From the Supreme Courts of the Dominion and the Commonwealth appeals lie to the Privy Council only by special leave, and in the case of the Commonwealth appeals are in certain instances prohibited save by permission of the Court itself.<sup>1</sup>

That the South African Constitution should interdict to Provincial Courts rights of appeal which are conceded to the Courts of the constituent States of a Federation, is at once a natural corollary and a further proof of its essentially unitary character.

Finance  
and  
Railways

It is highly significant of the economic and fiscal situation in South Africa that one of the most important chapters of the Constitution—a chapter containing no fewer than seventeen sections—should be devoted to the joint subject of 'Finance and Railways'. Not less significant is the conjunction of the two subjects, for, as we have already seen, the two are really interdependent.

As regards revenue and expenditure South Africa had no need of the meticulous provisions and precautions which, as we have seen, were embodied, after infinite and difficult discussion, in the Australian Commonwealth Act. Here as elsewhere the Constitution leaves the largest discretion to the Union Parliament, merely providing that, as soon as may be after the establishment of the Union, the Governor-General in Council should appoint a commission consisting of one representative from each

<sup>1</sup> Keith, *op. cit.*, pp. 980 seq.; *The Framework of Union*, cc. xi and xli.

provinces, and presided over by an officer from the Imperial Service,<sup>1</sup> to inquire into the financial relations which should exist between the Union and the provinces. All property belonging to the several Colonies was transferred to the Union, which assumed, on its side, responsibility for all colonial debts and liabilities. Compensation, within specified limits, was also to be paid to the municipal councils of the provincial capitals for any loss sustained by them, in the form of diminution of prosperity or decreased rateable value, by reason of their ceasing to be the seats of government of their respective colonies.

Much more elaborate were the provisions as regards railways and harbours. Section 125 enacted that all ports, harbours, and railways belonging to the several Colonies at the establishment of the Union should from the date thereof vest in the Governor-General in Council, and that no railway for the conveyance of public traffic, and no port, harbour, or similar work, should be constructed without the sanction of Parliament.

There was also to be formed a Railway and Harbour Fund, into which should be paid all revenues raised or received by the Governor-General in Council from the administration of the railways, ports, and harbours, and the fund was to be appropriated by Parliament to the purposes of the railways, ports, and harbours in the manner prescribed by the Act. If, however, the State was to be the owner of the railway system, experience proved the absolute necessity of removing the actual administration of the property as far as possible from the immediate control of the Government of the day. To this end section 126 enacted as follows :

'Subject to the authority of the Governor-General in Council, the control and management of the railways, ports, and harbours of the Union shall be exercised through a board consisting of not more than three commissioners, who shall be appointed by the Governor-General in Council, and a minister of State, who shall be chairman. Each commissioner shall

<sup>1</sup> Sir George Murray was selected for this important duty.

hold office for a period of five years, but may be reappointed. He shall not be removed before the expiration of his period of appointment, except by the Governor-General in Council for cause assigned, which shall be communicated by message to both Houses of Parliament within one week after the removal, if Parliament be then sitting, or, if Parliament be not sitting, then within one week after the commencement of the next ensuing session. The salaries of the commissioners shall be fixed by Parliament and shall not be reduced during their respective terms of office.

A subsequent section somewhat naïvely insisted that railways and harbours should be administered on business principles, due regard being had to agricultural and industrial development within the Union, and the promotion, by means of cheap transport, of the settlement of an agricultural and industrial population in the inland portions of all provinces of the Union. The section proceeds thus : ' So far as may be, the total earnings shall be not more than are sufficient to meet the necessary outlays for working, maintenance, betterment, depreciation, and the payment of interest due on capital not being capital contributed out of railway or harbour revenue, and not including any sums payable out of the Consolidated Revenue Fund.' The Board was authorized to establish a fund out of railway and harbour revenue to be used for maintaining, as far as may be, uniformity of rates notwithstanding fluctuations in traffic. It was also provided that all balances standing to the credit of any fund established in any of the Colonies for railway or harbour purposes at the establishment of the Union should be under the sole control and management of the Board, and should be deemed to have been appropriated by Parliament for the respective purposes for which they have been provided. There then followed some very elaborate precautions, originally recommended in Lord Selborne's memorandum, and intended to prevent political jobbery in the construction of new railways :

' Every proposal for the construction of any port or harbour works or of any line of railway, before being submitted to

Parliament, shall be considered by the Board, which shall report thereon, and shall advise whether the proposed works or line of railway should or should not be constructed. If any such works or line shall be constructed contrary to the advice of the Board, and if the Board is of opinion that the revenue derived from the operation of such works or line will be insufficient to meet the costs of working and maintenance, and of interest on the capital invested therein, it shall frame an estimate of the annual loss which, in its opinion, will result from such operation. Such estimate shall be examined by the Controller and Auditor-General, and when approved by him the amount thereof shall be paid over annually from the Consolidated Revenue Fund to the Railway and Harbour Fund: Provided that, if in any year the actual loss incurred, as calculated by the Board and certified by the Controller and Auditor-General, is less than the estimate framed by the Board, the amount paid over in respect of that year shall be reduced accordingly so as not to exceed the actual loss incurred.'

If, under the directions of the Executive or Parliament, the Railway Board is compelled to provide unremunerative services, it is entitled to be repaid from the general revenue of the Union.

This safeguard, as Mr. Brand points out, was prompted by 'some discreditable incidents in past railway history particularly in Cape Colony'.<sup>1</sup> The authors of the Constitution had recent and bitter experience of the financial pressure exercised by the several Colonial Governments by means of their railway systems. Nor were they ignorant of the serious evils attendant upon the State ownership and management of railways in Australia. So clearly were these evils recognized in Australia itself, that in every State control has now been transferred from the Ministry to Commissioners, though a minister for railways is still answerable to Parliament for the general policy pursued.

Finally, as a further guarantee of financial purity, a controller and auditor was to be appointed and to be

<sup>1</sup> *Op. cit.*, p. 95. South Africa intends to profit alike by its own experience in the past and by that of the Australian Commonwealth.

immovable except on a joint address from both Houses of Parliament.

General  
reflec-  
tions on  
the Con-  
stitution

The foregoing review will have made it clear that the authors of the South Africa Act took immense pains to anticipate difficulties and to guard against them. Yet the outstanding feature of the Constitution is the large measure of confidence reposed by its authors in the united Parliament which it brought into being. Detailed provisions proper, and indeed indispensable, to a federal instrument, are out of place in a Constitution designed for a unitary State. A Parliament, virtually sovereign, must necessarily be trusted to work out its own constitutional salvation.

Launched on its career only in 1910, the young Dominion found itself confronted, almost in infancy, by a world-crisis of unexampled severity. The reactions of world-politics were particularly severe upon South Africa. In no quarter of the world was Germany's assault upon the British Empire more elaborately planned or more precisely executed than in South Africa. That the young Commonwealth should, under the superb leadership of General Botha and General Smuts, have courageously confronted and successfully surmounted the dangers, foreign and domestic, by which it was threatened, is not only conclusive testimony to the wisdom and generosity of British statemanship in the past, but of high promise for the future of South Africa.

## VI. THE ORGANIZATION OF THE EMPIRE

### *The Manchester School. Imperial Federation. The Colonial Conference*

'To speak the plain truth. I have in general no very exalted opinion of the value of paper Government . . . my hold of the Colonies is in the close affection which grows from common names, from kindred blood, from similar privileges, and equal protection. These are ties which, though light as air, are as strong as links of iron.'—EDMUND BURKE.

'If a dominant country understood the true nature of the advantages arising from the supremacy and dependence of the related communities, it would voluntarily recognize the legal independence of such of its own dependencies as were fit for independence; it would, by its political arrangements, study to prepare for independence those which were still unable to stand alone; and it would seek to promote colonization for the purpose of extending its trade rather than its empire, and without intending to maintain the dependence of its colonies beyond the time when they need its protection.'—SIR GEORGE CORNEWALL LEWIS.

'The other alternative is, that England may prove able to do what the United States does so easily, that is, hold together in a federal union countries very remote from each other. In that case England will take rank with Russia and the United States in the first rank of states measured by population and area, and in a higher rank than the states of the Continent.'—PROFESSOR SEELEY.

WE have now traced the steps by which the most important Colonies have been admitted to the privileges and duties of Responsible Government. Three of the greatest of the Dominions have, as already indicated, advanced to a further stage in constitutional evolution: Canada and Australia have established a Federal system of government; the four self-governing colonies in South Africa have merged their individual identity in a Union.

The  
Govern-  
ment  
of the  
Empire

Further questions remain to be answered; a more difficult problem has still to be solved. Has the centripetal force, among the peoples of British blood, exhausted itself? May not the same principle, which has wrought so great and so rapid a change in the political form and

administrative system of three great Dominions, operate in the same direction in the British Commonwealth as a whole? Is territorial contiguity and continuity essential to Federalism? Does the sea necessarily divide a sea-empire; may it not unite?

Contrasted  
Ideals To these questions various answers have been and will be given, according to the conception held as to the ideal relation between a Parent State and its offspring. Ideals are sharply contrasted: the one being represented by the *ἀποικία* of ancient Greece; the other by the *coloniae* of Rome. The former looks upon a colony as a mere swarming of surplus population which carries to distant lands the ideas and traditions, the culture and creed, the language and laws of the motherland, but is no longer connected with it by any ties of allegiance, constitution, or government. The latter regards the colonies and the motherland as parts of a common political organism, connected the one with the other not only by bonds of kindred, creed, or affection, but by the 'forms and machinery of a constitution'. In the modern world the one school looks for inspiration to the teaching of Burke; the other derives much of its encouragement from the success with which Alexander Hamilton and other architects of the United States of America carried into practical effect the federal principles they had preached. Burke's doctrines were set forth at length in his speeches on American Taxation. They are summarized in the sentences quoted therefrom and prefixed to this chapter.

Burke Burke, though a sentimentalist, was not a separatist. He had no wish to see the union between the motherland and the dependencies dissolved; on the contrary he was supremely anxious that it should be preserved; his main concern was lest the means adopted by George Grenville and Charles Townshend should defeat the object at which presumably they aimed.

Adam Smith The Manchester School, on the other hand, were frankly indifferent as to the preservation of political or even of

spiritual ties. Looking for inspiration not to Burke but to Adam Smith, they exaggerated, as is the wont of disciples, and even misrepresented the teaching of their master. No more than Burke was Adam Smith a separatist; he may rather be regarded as one of the earliest of the federalists. He proposed, indeed, that Great Britain should admit to the Imperial Parliament such a number of representatives from each colony 'as suited the proportion of what it contributed to the public revenue of the empire'. 'There is', he wrote in a famous passage, 'not the least probability that the British Constitution would be hurt by the union of Great Britain with her colonies. That Constitution, on the contrary, would be completed by it and seems to be imperfect without it. The assembly which deliberates and decides concerning the affairs of every part of the empire, in order to be properly informed, ought certainly to have representatives from every part of it.'<sup>1</sup> The case for federalism could not be more concisely or more conclusively stated.

Adam Smith's zeal for political representation arose, however, in large measure from his condemnation of the commercial relations subsisting between Great Britain and the American Colonies. It is now generally admitted that Adam Smith minimized the merits and exaggerated the defects of the mercantile system with all its 'mean and malignant expedients'. Yet his denunciation is hardly consistent. On the one hand he insists that 'under the present system of management Great Britain derives nothing but loss from the dominion which she assumes over her colonies'. On the other he admits that 'the natural good effects of the colony trade more than counterbalance to Great Britain the bad effects of the monopoly; so that monopoly and all together, that trade even as it is carried on at present is not only advantageous but greatly advantageous'; while in regard to the trade of the colonies he insists that although the policy of

<sup>1</sup> *Wealth of Nations*, Book IV, c. vii.



Great Britain 'has been dictated by the same mercantile spirit as that of other nations, it has upon the whole been less illiberal and oppressive than that of any of them'.<sup>1</sup>

The Manchester School

The prophets of the Manchester School inherited from Adam Smith his detestation of commercial restraints and monopolies, without any portion of his Imperialist faith. Their views, purely materialistic as regards the relations between a Parent State and its offspring, are faithfully reflected in Sir George Cornewall Lewis's classical work on the *Government of Dependencies*. The argument of the *Essay* is summarized in the following passage :

'If a dominant country understood the true nature of the advantages arising from the supremacy and dependence of the related communities, it would voluntarily recognize the legal independence of such of its own dependencies as were fit for independence ; it would, by its political arrangements, study to prepare for independence those which were still unable to stand alone ; and it would seek to promote colonization for the purpose of extending its trade rather than its empire, and without intending to maintain the dependence of its colonies beyond the time when they need its protection.'<sup>2</sup>

Cobden

Lewis was by no means alone in the views he expressed. They were re-echoed by the whole of the 'Manchester School', then, and for some years longer, dominant in English politics. Thus in 1849 Lord Grey, Secretary of State for the Colonies, wrote to Lord Elgin :

'There begins to prevail in the House of Commons, and I am sorry to say in the highest quarters, an opinion (which I believe to be utterly erroneous) that we have no interest in preserving our colonies and ought, therefore, to make no sacrifice for that purpose. Peel, Graham, and Gladstone, if they do not avow this as openly as Cobden and his friends, yet betray very clearly that they entertain it, nor do I find some members of the [Lord John Russell's] Cabinet free from it.'<sup>3</sup>

Cobden himself went even farther when he wrote (1842) :

<sup>1</sup> *Ibid.*

<sup>2</sup> *The Government of Dependencies*, p. 324 (ed. 1891).

<sup>3</sup> Quoted *ap. Hall, op. cit.*, p. 48.

'The Colonial system with all its dazzling appeals to the passions of the people, can never be got rid of except by the indirect process of Free Trade which will gradually and imperceptibly loose the bands which unite our Colonies to us by a mistaken notion of self-interest.'<sup>1</sup>

Nor did these views, so far as it is possible to ascertain, evoke dissent or opposition from any quarter. Their prevalence may be illustrated by one more quotation.

Mr. Arthur Mills's *Colonial Constitutions*, published in 1856, was hardly less representative of the prevailing sentiment than Lewis's *Essay*. This is his deliberate conclusion ✓ 'To ripen these communities [the Colonies]

Arthur  
Mills's  
*Colonial  
Constitu-  
tions*,  
1856

to the earliest possible maturity social, political, commercial, to qualify them by all the appliances within the reach of the parent state, for present self-government and eventual independence is now the universally admitted aim of our Colonial policy.'<sup>2</sup> So late indeed as 1872, Tennyson was impelled to repudiate the suggestion, emanating from a responsible quarter, that the Canadians should 'take up their freedom as the days of their apprenticeship were over'.<sup>3</sup>

And that true North, whereof we lately heard  
A strain to shame us, 'keep you to yourselves,  
So loyal is too costly! Friends, your love  
Is but a burthen: loose the bond and go.'  
Is this the tone of Empire?

The tone of Empire it was not; but that tone had as yet hardly been sounded either in the homeland or in the Colonies. So long as the supremacy of the Manchester School lasted the Imperial note was hardly heard.

At the same time it must not be assumed that the influence exerted by that school upon Colonial policy was devoid of any advantage to the Empire. To it we owe in the main the triumph of the principle of 'Responsible' Government. Its influence is seen, therefore, at its best in Lord Durham's *Report* and in the policy founded

<sup>1</sup> Morley, *Cobden*, i. 230.

<sup>2</sup> p. lxix

<sup>3</sup> *The Times*.

thereon. Not that Durham himself was a separatist. The men of his generation for the most part regarded self-government as the goal of the constitutional evolution of Colonies under the Crown. Still more they looked upon it as the necessary condition of that period of political apprenticeship which was to be the prelude to complete independence.

Contrary  
views

To this general rule there were a few outstanding exceptions: Lord Durham himself was one; among others were Sir William Molesworth and Lord Grey, together with Durham's colleagues Gibbon Wakefield and Charles Buller. Molesworth's enlightened views entitle him, indeed, to be reckoned one of the forerunners of the Imperial Federal movement: as is evidenced by a passage in a speech delivered in the House of Commons in 1850:

Sir W.  
Moles-  
worth

'I maintain that whenever the local circumstances of a colony will admit the existence of a Colonial Parliament, the Colonial Parliament ought to possess powers corresponding with those of the British Parliament, with the necessary exception of Imperial powers. For if it were to possess Imperial powers, it would become an Imperial Parliament; and as there cannot be two Imperial Parliaments in one Empire, the British Empire would be dissolved.'

Later in the same speech he said that, as the United States is a system of States clustered round a central Republic, so 'our Colonial Empire ought to be a system of Colonies clustered round the hereditary monarchy of England. The hereditary monarchy should possess all the powers of Government with the exception of that of taxation, which the central Republic possesses. If it possessed less the Empire would cease to be one body politic.' In this passage there is a clear foreshadowing of that division of powers which is a specific characteristic of federal government. There is no hint, however, of separatism, nor is there in Durham's famous *Report*. Durham was convinced by his own observation that 'the predominant feeling of all the English population of the North American Colonies is that of devoted attach-

Lord  
Durham

ment to the mother country'. Upon that conviction he founded his argument for the grant of Responsible Government. That the concession would lead to a demand for independence he did not believe.

'I am well aware that many persons both in the Colonies and at home view the system which I recommend with considerable alarm, because they distrust the ulterior views of those by whom it was originally proposed and whom they suspect of urging its adoption with intent only of enabling them the more easily to subvert monarchical institutions or assert the independence of the Colony. I believe however that the extent to which these ulterior views exist has been greatly overrated . . . the attachment constantly exhibited by the people of these provinces towards the British Crown and Empire has all the characteristics of a strong national feeling. . . . I do not anticipate that a Colonial legislature thus strong and thus self-governing would desire to abandon the connexion with Great Britain. . . . I am in truth so far from believing that the increased weight and power that would be given to these Colonies by union would endanger their connexion with the Empire, that I look to it as the only means of fostering such a national feeling throughout them as would effectually counter-balance whatever tendencies may now exist towards separation.'<sup>1</sup>

If the Manchester School is seen at its best in Lord Durham's *Report*, it is seen at its worst in the policy pursued by Lord Glenelg in South Africa. Lord Glenelg, was Secretary of State for the Colonies in Lord Melbourne's second administration (1835). A kind-hearted gentleman, a genuine philanthropist, but essentially a doctrinaire, Glenelg was deeply imbued with the tenets of the Manchester School, and was most anxious to set limits to the boundaries of the Empire. 'The great evil of the Cape Colony', he wrote, 'consists in its magnitude.' Unfortunately, the boundaries of the Cape Colony had lately been extended up to the Kei River, the annexed territory being organized as the new Province of Queen Adelaide. The extension was conceived in the best

Lord  
Glenelg in  
South  
Africa

interests of humanity and of orderly administration. Hitherto the frontiers of the Colony had been the scene of repeated Kaffir inroads, accompanied by terrible atrocities. The action of the Governor, Sir Benjamin D'Urban, was warmly supported by the Colonists, and above all by the missionaries. Lord Glenelg, however, took the view that all extensions of territory were in themselves undesirable, that the natives who had been expelled from the Colony were the victims of 'systematic injustice', that their raids were an attempt to 'extort by force that redress which they could not expect otherwise to obtain', and he recalled the Governor and ordered the immediate retrocession of the newly annexed province of Queen Adelaide. Commenting on these events, Sir Charles Lucas justly observes :

'Few decisions have had more far-reaching results than that which was embodied in Lord Glenelg's dispatch. It would be foolish and unjust not to credit the author of the dispatch with courage and high principle, but it is impossible, on the other hand, to acquit him of wrong-headed obstinacy. In many ways, direct and indirect, the course of action which he prescribed worked mischief not least in the precedent which it furnished for after times. It was the beginning of undoing in South Africa.'<sup>1</sup>

The  
Weary  
Titan      Lord Glenelg's policy in South Africa, though peculiarly mischievous in its local consequences, was entirely consistent with the views which, during all the middle years of the century, prevailed at Whitehall. The Titan was weary of the burden imposed upon him ; the triumph of Free Trade would soon reduce to a minimum the economic advantages of an extended Empire ; the young communities, guarded with parental solicitude during the period of adolescence, would one by one reach man's estate and endowed with the liberty appropriate to that status would set up for themselves, and contribute, in free but friendly competition, to the common good of the family of nations. Such was the settled policy, begotten

<sup>1</sup> *Op. cit.*, p. 162.

in part of cynical indolence but not wholly lacking in a high idealism, consistently pursued by successive ministries from the passing of the first Reform Bill to the passing of the second. The high permanent officials of the Colonial Office shared and perhaps inspired the policy of their political chiefs. Sir James Stephen, permanent Under-Secretary (1836-47), Herman Merivale (1847-59),<sup>1</sup> and Sir Frederick Rogers (afterwards Lord Blachford) (1860-71) were in full accord with each other and with their colleague Sir Henry Taylor, alike as to the goal to be aimed at and the best means of attaining it. 'I go very far with you', wrote Rogers to Taylor in 1865, 'in the desire to shake off all responsibly governed colonies', while Taylor went so far, about the same time, as to write to his chief the Duke of Newcastle as follows: 'In my estimation the worst consequence of the late dispute with the United States has been that of involving this country and its North American provinces in closer relations and a common cause.'<sup>2</sup> In a sentence such as this we reach, as Mr. Duncan Hall justly says, 'the lowest depth of the separatist movement.'<sup>3</sup> But even more characteristic was the satirical interrogation of Mr. Goldwin Smith: 'What shall we give to England in place of her useless dependencies? What shall we give to a man in place of his heavy burden or dangerous disease? What but unencumbered strength and the vigour of reviving health?'<sup>4</sup>

There remains to be noticed evidence of a different and still more conclusive character. The above citations represent, it may be objected, the views, however typical they may be, only of individuals. How far official opinion had gone, in the direction indicated, may be judged from the draft of a Bill actually prepared by

<sup>1</sup> Merivale was at one time Professor of Political Economy at Oxford and published in 1841 two volumes of *Lectures on Colonization and Colonies*, by no means lacking in intrinsic value and of even greater value as typical products of that period.

<sup>2</sup> Sir Henry Taylor, *Autobiography*, vol. ii, pp. 234-42, quoted by Duncan Hall, *The British Commonwealth of Nations* (1920), pp. 50, 51.

<sup>3</sup> *Ibid.*, p. 51.

<sup>4</sup> *The Empire*, p. xix, Oxford, 1863.

Lord Thring, who was at that time Parliamentary Counsel to the Treasury. This Bill, according to an analysis given by Sir George Parkin,<sup>4</sup> embodied 'an attempt to put upon a just basis the relations between Britain and her colonies at each period of their growth' from Crown Colony to Responsible Government. The attainment of the latter stage is made dependent not upon pressure from the colony, but upon 'a definite increase of European population and other conditions equally applicable to all colonies alike'. There was to be a definite distribution of powers between the local and Imperial Governments, and a definite distribution of burdens and responsibilities. Finally, 'as the natural termination of a connexion in itself of a temporary character' (to quote from the preface to the Bill), provision is made for the formal separation of a colony and its erection into an independent State, so soon as its people feel equal to undertaking this responsibility. The last provision is in the present connexion of peculiar significance. It affords the clearest indication of the official view that 'Responsible Government' was only a transitory stage, a preliminary apprenticeship for complete and independent statehood.

That Responsible Government was not likely to be the final stage in constitutional evolution might be conceded by men of all parties and opinions. The contents of preceding chapters have proved the accuracy of the diagnosis. But was it necessarily a preliminary to separation? Events have negatived this assumption. It was not, however, till 1867 that Canada showed the way to a singularly interesting and at that time a unique experiment in the art of Politics: the combination of the Federal principle with the Parliamentary under the aegis of a constitutional monarchy.

Decline of  
the Man-  
chester  
School

During the last three decades of the nineteenth century the dreams of the Manchester School were dismally dissipated. *Laissez-faire* rapidly lost ground in the sphere

<sup>1</sup> *Imperial Federation*, 1892, pp. 10 seq.

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of social economics. Prussia, under the masterful domination of Bismarck, proved that blood and iron could accomplish that which parliamentary methods, as exemplified at Frankfort, had pitifully failed to do. The conflicts between Prussia and Austria, between Germany and France, between Russia and Turkey, between the United States and Spain, indicated that war was not yet banished from the earth.

Moreover, hardly had Germany attained, almost at a single stride, to hegemony in Europe before she began to develop colonial ambitions, and to manifest a desire, not unnatural, to play her part in world politics. In 1871 Germany possessed not one foot of territory outside Europe. A single year (1883-4) sufficed to bring her to the third place among European Powers in Africa and to establish her in the Pacific. The process of industrialization in Germany, though a century later than in England, was, when initiated, extraordinarily rapid. German manufacturers called out for raw materials which only the tropics could supply. German merchants sought and found markets for the surplus products of the German factories in non-European countries. Holding the view that if trade follows the flag the flag must protect trade, Germany sought to emulate the example of England. But one thing she lacked. She could supply goods in large and rapidly increasing quantities; soldiers she could send in plenty; but she could not induce her citizens to face the risks and discomforts of pioneering work on the frontiers of Empire. Her sons were prepared to fight, to trade, to govern, but not to settle—under the German flag. Yet they went readily at the rate of about 200,000 a year, finding a home, or at least a settlement, chiefly in the United States and Brazil. Bismarck was perturbed at the loss of cannon-fodder: 'A German who can put off his fatherland like an old coat is no longer a German for me.' Hence his somewhat tardy conversion to the

Colonial  
ambitions  
of  
Germany



policy of the *Deutscher Kolonialverein*—a society founded at Frankfort in December 1882.

France  
and Italy

Germany was not, of course, alone in colonial enterprise, though her activities, so tardily aroused, were the most remarkable. Jules Ferry, who became Prime Minister of France in 1880, sought, not wholly without success, to divert the minds of his countrymen from the thoughts of *ravanche* on the Rhine to Northern Africa and the Far East. Italy having, like Germany, achieved unity in 1871, also embarked upon colonial enterprises, with indifferent success, in East Africa. Plainly, a new spirit was moving on the face of the waters: and under the impulse of that new spirit the Cobdenite dream faded. Amid the scramble for colonial territory and the struggle for protected markets the bases of Free Trade crumbled.

There were not lacking other convergent tendencies. The successful achievements of the Federal principle in Canada and Germany; the attempt to apply it in South Africa; the movement towards it in Australia—all helped to turn men's minds to a study of federalism as a form of government. The publication, in 1863, of Mr. Freeman's *History of Federal Government* had supplied an historical background.

British  
Imperial-  
ism

By the middle of the seventies the separatist force seems to have spent itself in England. The publication of Tennyson's spirited protest, already quoted, evoked a prompt response from Canada, on whose behalf the Governor-General Lord Dufferin wrote to thank the Poet-Laureate for the 'spirited denunciation' with which he had 'branded those who are seeking to dissolve the Empire and to alienate and to disgust the inhabitants of this most powerful and prosperous Colony'. Since arriving here, Lord Dufferin went on,

'I have had ample opportunity of becoming acquainted with the intimate conviction of the Canadians upon this subject, and with scarcely an individual exception I find they cling with fanatical tenacity to their birthright as Englishmen and to their hereditary association in the past and future

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glories of the mother-country. . . . They take the liveliest interest in her welfare and entertain the strongest personal feeling of affection for their Sovereign. . . . Your noble words have struck responsive fire through every heart; they have been published in every newspaper, and have been completely effectual to heal the wounds occasioned by the senseless language of *The Times*.<sup>1</sup>

Tennyson's protest did but re-echo a sentiment which in the seventies was rapidly growing in volume. Hitherto the expression of Imperial patriotism had been sporadic; after 1875, it was, if not fashionable, by no means a mark of eccentricity, and in the early eighties the movement towards Imperial Federation began definitely to take shape. The first occasion upon which the idea of Imperial Federation emerges with any clearness seems to have been in a lecture delivered by Mr. J. R. Godley in New Zealand on 1 December 1852. Mr. Godley was clearly of opinion that a Federal scheme ought to precede the concession of complete self-government.

'Before the time arrives', he said, 'when these Colonies, conscious of power, shall demand the privilege of standing on equal terms with the Mother-country in the family of nations, I trust that increased facility of intercourse may render it practical to establish an Imperial Congress for the British Empire, in which all its members may be fairly represented and which may administer the affairs which are common to all.'

Two years later Mr. Joseph Howe, an eminent colonial statesman, spoke in the legislature of Nova Scotia to similar effect.

'I would not', he said, 'cling to England one single hour after I was convinced that the friendship of North America was undervalued, and that the status to which we may reasonably aspire has been deliberately refused. But I will endeavour while asserting the rights of my native land with

<sup>1</sup> *Memoir of Lord Tennyson*, by his son, vol. ii, p. 143. *The Times* had in a recent article advised the Canadians to 'take up their freedom' as the days of their apprenticeship were over. On the date, 8 November 1872, Tennyson writes in his diary, 'Lady Franklin has sent me that Canadian bit of *The Times*. Villainous!'

boldness, to perpetuate our connexion with the British Isles . . . the statesmen of England may be assured that if they would hold this great Empire together they must give the outlying portions of it some interest in the naval, military, and civil services. . . . I have often thought, sir, how powerful this Empire might be made ; how prosperous in peace, how invincible in war, if the statesmen of England would set about its organization and draw to a common centre the high intellects which it contains. If the whole population were united by common interests, no power on earth ever wielded means so vast or influence so irresistible.' <sup>1</sup>

The  
shrinkage  
of the  
globe

✓ The facilities of intercourse predicted in 1852 by Mr. Godley were not then, nor for some years afterwards, available. During the next twenty years, however, the progress of scientific discovery and of engineering enterprise was extraordinarily rapid. Two achievements are in this connexion particularly relevant. ✓ In 1866 the first Atlantic cable was successfully laid ; ✓ in 1869 the Suez Canal was opened. The world was rapidly passing under the dominion of physical science, and the triumph of science meant the shortening of distance and time, and a consequent shrinkage of the globe.

The idea of applying the Federal principle to the British Empire, never wholly abandoned, was definitely revived by an article contributed to *The Contemporary Review* for January 1871 by Mr. Edward Jenkins, who proposed that a Federal Parliament for Imperial affairs should be set up, and at the same time indicated the questions with which such a parliament ought to deal. In July 1871 a Conference on Colonial questions was held at the Westminster Palace Hotel, and a paper was read by Mr. de Labilliere on Imperial and Colonial Federalism in which he advocated an Imperial Federal Parliament with an executive responsible thereto. Thenceforward the question was frequently discussed in the Reviews, and at meetings of such bodies as the Social Science Congress, and the Royal Colonial Institute which, founded in 1868,

<sup>1</sup> Ap. F. P. de Labilliere, *Federal Britain*, pp. 9-10.

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has done yeoman service in the cause of Imperial unity. At a meeting of the Institute in 1881 Mr. de Labilliere read an exhaustive paper on the political organization of the Empire.<sup>1</sup> By this time the Federal idea was fairly launched, and in 1883 it received an immense impulse from the publication of a remarkable series of lectures delivered before the University of Cambridge by Professor Seeley. In the *Expansion of England* Seeley gave to the political history of England, during the two previous centuries, a new interpretation. The lesson of the American Revolution had in his opinion been misconceived. Not schism but union, was the moral to be drawn from the story. England lost its first Empire by the adoption of a false theory of Colonial relations. The second Empire must be preserved by the promulgation of a sound theory.

Seeley's  
*Expansion of  
England*,  
1883

'If the Colonies are not, in the old phrase, possessions of England, then they must be a part of England; and we must adopt this view in earnest. . . . When we have accustomed ourselves to contemplate the whole Empire together and call it all England we shall see that here too is a United States. Here too is a great homogeneous people, one in blood, language, religion and laws, but dispersed over a boundless space. . . . If we are disposed to doubt whether any system can be devised capable of holding together communities so distant from each other, then is the time to recollect the history of the United States of America. They have solved this problem.<sup>2</sup>

Seeley's hope was that we might do likewise. His book was widely read, and immensely influential in moulding educated opinion. A year after its publication a most important practical step was taken.

In 1884 there was founded the *Imperial Federation League*—an association supported by men of all parties, among its founders being statesmen of the homeland like W. E. Forster, W. H. Smith, Edward Stanhope, Lord Rosebery, and Professor Bryce, and Colonial statesmen

The  
Imperial  
Federation  
League

<sup>1</sup> This paper is printed in de Labilliere, *Federal Britain*, pp. 86-124.

<sup>2</sup> *Expansion of England*, pp. 158-9.

such as Sir Charles Tupper, Sir Henry Parkes, and Sir Charles Gavan Duffy. ✓The object of the League was to secure by Federation the permanent unity of the Empire ; it insisted that any scheme of Imperial Federation should combine on an equitable basis the resources of the Empire for the maintenance of common interests, and should adequately provide for an organized defence of common rights ; but it was expressly laid down that the existing rights of local Parliaments as regards local affairs should be strictly reserved and respected. ✓The League was not committed to any cut-and-dried scheme of Federation, but in February 1885 its chairman, Mr. Forster, contributed to the *Nineteenth Century* a remarkable paper in which he clearly set forth the underlying principles and the immediate aims of the association for which he spoke. 'What', he asked, 'is meant by Imperial Federation ?' ✓His reply was : 'Such a union of the Mother Country with her Colonies as will keep the realm one state in relation to other states. *Keep not make* : for the Empire is one Commonwealth already. Then, "Why not let well alone ?"' Mr. Forster's answer to this question was classical and still stands. ✓For this reason : because in giving self-government to our Colonies we have introduced a principle which must eventually shake off from Great Britain greater Britain and dissolve it into separate States ; which must, in short, dissolve the union unless counteracting measures be taken to preserve it.' To grant to the Dominions domestic autonomy, but at the same time to deny to them any official or effective voice in foreign and Imperial policy, is to rely on contradictory principles of Government. They cannot permanently coexist. On the one side, all but complete autonomy ; on the other complete subordination. Precisely the same point was made in the same year (1885) by Sir James Service when he complained of 'the very anomalous position which these Colonies occupy as regards respectively local Government and the exercise of Imperial authority. In regard to the first the fullest measure of

constitutional freedom and parliamentary representation has been conceded to the more important colonies, but as regards the second we have no representation whatever in the Imperial system.' This state of things could not be expected permanently to endure. Friction might, with good luck, be avoided for a time, but sooner or later some question would be certain to arise which would strain to breaking-point the existing constitutional bonds. Even if that extreme issue were avoided, there must be, as Mr. Forster pointed out,

'great inconvenience, not to say real danger, to peace in this legal helplessness and powerlessness of the Colonies. They tried to seize the power of which they are deprived. The attempt, as it were, to right themselves by lynch law (as in the then recent cases of New Guinea and the Samoan Islands) . . . to enforce the hands of our Foreign and Colonial offices may be the only way of obtaining attention for reasonable claims; but these dangerous modes of assertion would not be tried if they felt that they had an acknowledged voice in the decision of questions deeply affecting their interests.'

Mr. Forster accordingly insisted that there must be some organization for common defence and a joint foreign policy: 'An official acknowledgement of the right of the Colonies to have a voice in the determination of foreign policy especially where such policy directly affects their feelings or interests.' Rejecting, not as intrinsically unsound but merely as premature, the suggestion of a Federal Parliament, Forster adopted a proposal put forward by Lord Grey in 1879 for a Federal Council. This Council was to deal 'with peace and war and treaties and negotiations and also with all questions affecting the defence of the realm, the fortification of its ports and posts, the provision for its Army and Navy, the determination of the strength of each service, and especially the respective contributions by each member of the Imperial Commonwealth for such defence'. But although the time was plainly ripe for such a development in 1885, progress has not during the intervening years been rapid.

The  
Colonial  
Confer-  
ence

As regards the constitutional machinery of the Empire the period between 1885 and 1925 divides into two unequal parts. The outbreak of the Great War in August 1914 is the dividing line. During the earlier part by far the most significant development was found in the initiation and elaboration of the Colonial Conference. The first of these meetings took place in 1887. The precise moment was perhaps suggested by the coincidence of the Jubilee celebrations of that year, but many other things contributed to the momentous decision taken by Lord Salisbury's Government.

In proroguing Parliament in 1886 the Queen gave expression to a sentiment which was very generally entertained :

' I am led to the conviction that there is on all sides a growing desire to draw closer in every practicable way the bonds which unite the various portions of the Empire. I have authorized communications to be entered into with the principal Colonial Governments with a view to the fuller consideration of matters of common interest.'

✓ The Queen's conviction was doubtless inspired by the wave of Imperial sentiment which was at the moment sweeping over the country. The maladroitness—to use no harsher term—displayed by the Gladstone Government in regard to New Guinea and Samoa ; the enthusiasm evoked by the participation of colonial troops in the recent Egyptian campaign ; the defeat of Mr. Gladstone's first Home Rule Bill and the great Unionist victory in 1886 ; the ' splendid isolation ' of Great Britain in European diplomacy ; the seizure of Penjdeh by Russia and the anticipated attack upon India ; and, not least, the conscious and devoted labours of the Imperial Federation League, then at the zenith of its influence both at home and in the overseas Dominions—all these and other things tended to stimulate Imperial patriotism. The Government wisely seized the occasion, thus obviously presented to them, for a step forward in the development of Imperial unity.

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With characteristic caution the subject of Imperial Federation—indeed of constitutional relations—was expressly excluded from the agenda of the first Conference. In their letter of invitation the Government had expressed the opinion that 'it might be detrimental to a more developed system of united action if a question not yet ripe for practical decision were now to be brought to the test of a formal examination'. The same point was taken by Lord Salisbury in his opening address. Notwithstanding this prudent embargo it was impossible to conceal the dissatisfaction felt by some of the greater Colonies with the anomalies and humiliations incidental to their existing constitutional position. Mr. Deakin, in particular, speaking on behalf of the Australasian Colonies, gave courteous but caustic expression to this sentiment:

✓ Austral-  
ian critic-  
ism

'We have observed with close interest the discussion that has taken place in the Mother Country upon the question of a spirited foreign-policy. There are some of us who live in hopes to see it a vital issue in the politics of Great Britain as to whether there shall not be a spirited Colonial policy as well; because we find that other nations are pursuing a policy which might fairly be described as a spirited Colonial policy. One has only to turn to the dispatches which have passed between this country and the Australian Colonies upon the subject of New Guinea and the New Hebrides, and to compare them with the dispatches published in the same Blue Book, taken from the White Book of the German Empire, and with the extracts of dispatches issued by the French Colonial Office, to notice the marked difference of tone. ✓ The dispatches received from England, with reference to English activity in these seas, exhibited only the disdain and indifference with which English enterprise was treated in the Colonial Office, and by contrast one was compelled to notice the eagerness with which the French and German statesmen received the smallest details of information as to the movements of their traders in those particular seas, and the zeal with which they hastened to support them . . . we hope that from this time forward, Colonial policy will be considered Imperial policy; and that Colonial interests will be considered and felt to be Imperial interests; and that they will be carefully



studied, and that when once they are understood, they will be most determinedly upheld.' <sup>1</sup>

|| The language is restrained but the sentiment is unmistakable. Nor was the Conference allowed to close without a more specific reference to the constitutional problem. At the concluding session Sir Samuel Griffith, as 'the oldest actual minister present' gave expression to a thought which on this historic occasion was in many minds :

✓ 'I consider that this Conference does comprise what may perhaps be called the rudimentary elements of a parliament ; but it has been a peculiarity of our British institutions that those which have been found most durable are those which have grown up from institutions which were in the first instance of a rudimentary character. It is impossible to predicate now what form future conferences should take, or in what mode some day further effect would be given to their conclusions, but I think we may look forward to seeing this sort of informal Council of the Empire develop until it becomes a legislative body, at any rate a consultative body, and some day, perhaps, a legislative body under conditions that we cannot just now foresee.'

Joseph  
Chamber-  
lain

Ten years were destined to elapse before the Conference met again in the capital of the Empire. But from the point of view of Imperial solidarity the interval was not wholly unfruitful. ✓ In 1894 a conference met at Ottawa where it dealt mainly with questions of Imperial communications and commerce. More important than the Ottawa Conference was the fact that on the formation of Lord Salisbury's Conservative-Unionist Ministry, in 1895, ✓ the leader of the Liberal-Unionist wing in the House of Commons selected as his post the Secretaryship of State for the Colonies. ✓ Mr. Chamberlain's accession to the Colonial Office must be regarded as one of the significant political events in the latter part of the nineteenth century. Ever since his rupture with Mr. Gladstone on the Home Rule question Mr. Chamberlain's mind had been moving

<sup>1</sup> *Report of Conference*, pp. 24-5, quoted *op. Jebb's The Imperial Conference*—a valuable work of reference to which I desire to acknowledge my obligations.

steadily towards the project of Imperial unification. In this intellectual evolution he was avowedly influenced by the example of Germany.

'We have', he said, speaking at the annual dinner of the Canada Club in 1896, 'a great example before us in the creation of the German Empire. How was that brought about? You all recollect that, in the first instance, it commenced with the union of two of the States which now form that great empire in a commercial Zollverein. They attracted the other States gradually—were joined by them for commercial purposes. A council, a Reichsrath, was formed to deal with those commercial questions. Gradually in their discussions national objects and political interests were introduced, and so, from starting as it did on a purely commercial basis and for commercial interests, it developed until it became a bond of unity and the foundation of the German Empire.'

On the same text Mr. Chamberlain preached to the Congress of Chambers of Commerce of the Empire which met in London in 1896.

'If we had a commercial union throughout the Empire, of course there would have to be a Council of the Empire. . . . Gradually, therefore, by that prudent and experimental process by which all our greatest institutions have slowly been built up we should, I believe, approach to a result which would be little, if at all, distinguished from a real federation of the Empire.'<sup>1</sup>

In 1897, when representatives from every part of the Empire had come together in London for the celebration of Queen Victoria's 'Diamond' Jubilee, another Colonial Conference assembled under the presidency of the Colonial Secretary. Mr. Chamberlain's opening address marked an epoch in the history of imperial co-partnership. It was incomparably the boldest and frankest utterance to which colonial statesmen had ever listened from a responsible minister of the Crown. At Ottawa there had been no discussion of the constitutional problem, and the Home Government had been represented by Lord Jersey,

Colonial  
Conference of  
1897

<sup>1</sup> Jebb, *op. cit.* i. 310-11.

an ex-proconsul who was politically opposed to the Liberal Ministry which, in 1894, was in office in England. The London meeting of 1897 was on a totally different plane. Attended only by Prime Ministers it might truly be said to form a 'Cabinet of Cabinets' instead of a Conference of Governments such as had met in 1887. But in no respect was its enhanced significance more marked than by the position assigned to the constitutional problem by the president of the Conference.

'I feel', he said, 'that there is a real necessity for some better machinery of consultation between the self-governing Colonies and the Mother Country, and it has sometimes struck me—I offer it now merely as a personal suggestion—that it might be feasible to create a great council of the Empire to which the Colonies would send representative plenipotentiaries—not mere delegates who were unable to speak in their name, without further reference to their respective governments, but persons who by their position in the Colonies, by their representative character, and by their close touch with Colonial feeling, would be able upon all subjects submitted to them to give really effective and valuable advice. If such a council were created it would at once assume an immense importance, and it is perfectly evident that it might develop into something still greater. It might slowly grow to that Federal Council to which we must always look forward as our ultimate ideal.'

The immediate outcome of this Conference was hardly answerable to the high hopes entertained by its President. The *Report* does indeed testify to the existence of a strong feeling among some of the Colonial Premiers that 'the present relations could not continue indefinitely', though the following resolution was adopted, with the dissent only of New Zealand and Tasmania: 'The Prime Ministers here assembled are of opinion that the present political relations between the United Kingdom and the self-governing Colonies are generally satisfactory under the existing condition of things.' No resolution was adopted or even proposed in the sense suggested by Mr. Chamberlain.

Five years later the Conference again met in London under the same presidency. During the interval a great crisis in the history of the Empire had matured and been successfully surmounted. The wonderful loyalty displayed by the Dominions during the South African War; the deep chord of sympathy and solidarity touched, in every part of the Empire, by the death of Queen Victoria; the crowning of her son, coincident with the assembling of the Conference of 1902—these things might well have inspired a statesman less imaginative than Mr. Chamberlain with exceptional hopefulness as to the immediate future. Much of the discussion turned upon the question of preferential trade within the Empire—a project to which the Colonial Secretary gave his enthusiastic support. But with that question this work is not concerned. On the constitutional issue Mr. Chamberlain was explicit: he again avowed his own desire for ‘a real council of the Empire to which all questions of Imperial interest might be referred’, and at the same time he threw out a frank suggestion to his Colonial colleagues. ‘If you are prepared, at any time, to take any share, any proportionate share, in the burdens of the Empire, we are prepared to meet you with any proposal for giving to you a corresponding voice in the policy of the Empire.’

Of exceptional interest, in this connexion, was the resolution actually adopted by the Conference of 1902. The text of the resolution is as follows:

‘That so far as may be consistent with the confidential negotiations of Treaties with Foreign Powers, the views of the Colonies affected should be obtained in order that they may be in a better position to give adhesion to such Treaties.’

The principle is cautiously affirmed, but its significance is enhanced rather than impaired by the delicate consideration shown towards the susceptibilities of the Foreign Office, and the Home Government generally, and by the obvious apprehension of the difficulties with which questions of foreign policy are necessarily surrounded.

None the less is it clear that, after the lapse of a quarter

of a century, the self-governing Dominions were at last coming within sight of the goal discerned, in the far-off days, by Sir James Service and Mr. W. E. Forster. At last they were acknowledged to have some interest in the foreign policy of the Empire of which they were constituent parts.

Another important step was taken by the Conference of 1902 towards the regularization and definition of the constitution of the Conference itself, and the periodicity of its meetings. Future Conferences were to be held 'as far as practicable, at intervals not exceeding four years', and questions of common interest were to be considered 'as between the Secretary of State for the Colonies and the Prime Ministers of the self-governing Colonies'.

Before the time came for the meeting of the next Conference Mr. Chamberlain had ceased to be Colonial Secretary, and it fell to his successor Mr. Alfred Lyttelton to summon it. In doing so Mr. Lyttelton, himself an ardent disciple of his predecessor, made an important suggestion. In his view the time had come for transforming the 'Colonial Conference' into an 'Imperial Council' which should possess a continuous existence maintained by the creation of a supplementary commission and a permanent secretariat. Tentatively though the suggestion was put forward it excited some apprehension in Canada,<sup>1</sup> but before the Conference met in 1907 the Unionist Government had fallen, and the presidency devolved upon a statesman, experienced, courteous, and businesslike but eminently unimaginative, the late Earl of Elgin.

Confer-  
ence of  
1907

Nevertheless, the Conference of 1907 marked definite progress. Undaunted by the obvious lowering of the Imperial temperature, and notwithstanding the expressed hostility of His Majesty's Government, the Colonial representatives unanimously reaffirmed the 'Preference' resolution of 1902. They also made a determined attempt,

<sup>1</sup> Cf. Cd. 2785 of 1905.

on the lines indicated by Mr. Lyttelton's dispatch, to emancipate the 'Conference' from the control of the Colonial Office. The bureaucratic instincts of the 'Office' were, however, too strong for the young Dominions, and the effective parts of the resolution as ultimately adopted ran as follows :

'That it will be to the advantage of the Empire if a conference, to be called the *Imperial Conference*, is held every four years, at which questions of common interest may be discussed and considered as between *His Majesty's Government and His Governments of the self-governing Dominions beyond the Seas*. The Prime Minister of the United Kingdom will be *ex officio* President and the Prime Ministers of the self-governing Dominions *ex officio* members of the Conference. That it is desirable to establish a system by which the several Governments represented shall be kept informed during the periods between the Conferences in regard to matters which have been or may be subjects for discussion, by means of a permanent secretarial staff, charged, *under the direction of the Secretary of State for the Colonies*, with the duty of obtaining information for the use of the Conference, of attending to its resolutions, and of conducting correspondence on matters relating to its affairs.'

Three points which I have italicized in the text are worthy of note : (i) the term 'Colonial' has been definitely and finally abandoned in favour of 'Imperial' ; (ii) Dominion Ministries are for the first time referred to as 'His Majesty's' ; and (iii) the proposed permanent Secretariat was still to be associated with the 'Office'. The third point represented, in one sense, a victory for the British bureaucracy, but at the same time it did not preclude an administrative advance. In 1908 the work of the Colonial Office was reorganized : Dominion affairs were separated from those of the Crown Colonies and committed to a 'Dominions Division'. On the second point there was an instructive and significant debate, indicative of the desire of the Dominion Executives to be regarded as co-ordinate in status with 'His Majesty's Government' at home, and as, equally with its members,

'Servants of the King'. The wording, as eventually adopted, was a rather clumsy but not insignificant compromise. Four years later Sir Wilfrid Laurier was able to claim that the discussions of 1907 'were productive of material and even important results', and it is interesting to note that in his opinion the most important of those results was 'to substitute for the kind of ephemeral Colonial Conferences which had taken place before, a real Imperial system of periodical Conferences between the Government of His Majesty the King in the United Kingdom and [the precise phrase is noteworthy] the Governments of His Majesty the King in the Dominions beyond the Seas'.<sup>1</sup> One other point in the proceedings of 1907 demands notice. ✓The Australasian delegates were again, as in 1887, gravely perturbed by the proceedings of the Foreign Office in regard to the problems of the Pacific. In 1906, after years of indecision, the British Government had suddenly, without consultation with the Commonwealth or with New Zealand, concluded with France a Convention in regard to the New Hebrides. The whole transaction exhibited a flagrant disregard for the susceptibilities and interests of the people most closely concerned, and aroused bitter and just indignation amongst them. To this feeling Mr. Seddon, one of the most stout-hearted and whole-minded Imperialists, gave vigorous expression only a few hours before his lamented death (June 1906):

'The Commonwealth and New Zealand Governments are incensed at the Imperial Government Conference fixing conditions of dual protectorate in the New Hebrides without first consulting the Colonies so deeply interested. The Imperial Government calls upon us now for advice upon what is already decided, making our difficulties very great. The entire subject is of vital importance to the Commonwealth and New Zealand. We ought to have been represented at the Conference. If anybody had been there for us who knew anything about the subject, the result would have been very different. Whoever represented Britain French diplomacy

<sup>1</sup> *Minutes of Conference of 1911*, Cd. 5745, p. 24.

was too much for them. I cannot honourably say anything further, my hands and tongue are tied by the Imperial Government, but I wish I had the power of Joshua to make the sun stand still.'

Mr. Seddon's last message to the Empire was re-echoed in the speech of Mr. Deakin at the Conference of 1907. In that speech<sup>1</sup> the Premier of the Commonwealth referred to 'the indifferent attitude of statesmen in this country to British interests in the Pacific'; to the time now past when 'the anxiety of public men in this country was to avoid under any circumstances the assumption of more responsibilities and a great willingness to part with any they possessed'; to a feeling—'an exasperated feeling thus created in Australia—that British Imperial interests in that ocean have been mishandled from the first'; to the gross bungling of the Home Government in regard to New Guinea and the New Hebrides; to the misrepresentation of the Australians as a 'grasping people', the truth being that 'it is not a series of grasping annexations that we have been attempting, but a series of aggravated and exasperating losses which we have had to sustain'; and finally to the scandalous treatment of the Commonwealth in reference to the conclusion of the New Hebrides Convention. Mr. Deakin revived the memory of unfortunate incidents only, as he explained, 'as warnings for the future and in order to explain the feeling that exists'. To the indictment of the Home Government's procedure—their 'take it or leave it' attitude—there was in reality no answer. Speeches such as Mr. Deakin's, so grave in substance, so admirable in restraint, at once reveal in lurid light the ineptitude of Whitehall and compel admiration for the forbearance exhibited by the Dominions.

The blunder made by the Gladstone Government in 1884 had been, with singular fidelity to discredited precedent, repeated by the Campbell-Bannerman Ministry in 1906, and the Home Government was within an ace

<sup>1</sup> Cf. *Minutes of Proceedings*, Cd. 3523, pp. 548-60.



of again repeating it in 1915. The mere possibility of its repetition gave additional point to the attempt made by New Zealand, at the Conference of 1911, to put the constitutional arrangements of the Empire upon a less unsatisfactory footing.

Subsidiary  
Confer-  
ences,  
1907-11

The Conference of 1907 further resolved that upon matters of importance requiring consultation between two or more Governments which cannot conveniently be postponed until the next Conference, or involving subjects of a minor character or such as call for detailed consideration, subsidiary conferences should be held between representatives of the Governments concerned specially chosen for the purpose.<sup>1</sup> Under the terms of this resolution a Navigation Conference was held in 1907; Education Conferences in 1907 and 1911; a Copyright Conference in 1910, and a Surveyor's Conference in 1911. But of these subsidiary conferences the most important was one called to deal in 1909 with the question of naval and military defence. The Conference of 1907 had adopted the principle of the establishment of a general staff for the Empire. The function of the general staff was to study military science in all its branches; to collect and disseminate to the several Governments military information and intelligence; to prepare schemes of defence on a common principle, and, while not interfering with questions of command or administration, to advise, at the request of any Government, as to the training, education, and war organization of the military forces of the Crown in every part of the Empire.

Opportunity was also taken at the Conference of 1907 to discuss several detailed questions as to arms and ammunition (a point on which there was, nevertheless, considerable friction between the Canadian and the Home Government after the outbreak of war),<sup>1</sup> exchange of officers, cadets, military schools and rifle clubs.

Defence  
Confer-  
ence,  
1909

The Defence Conference which met in 1909 fully

<sup>1</sup> Sir Sam Hughes, Minister of Militia in the Dominion, favoured the use of the Ross rifle which had been rejected by the British War Office.

justified its existence. The functions of the Conference were purely consultative and it deliberated in private, but the conclusions which it reached were subsequently communicated to the House of Commons by the Prime Minister (Mr. Asquith). According to his summary the Conference agreed to recommend to their respective Governments a plan 'for so organizing the forces of the Crown wherever they are that, while preserving the complete autonomy of each Dominion, should the Dominions desire to assist in the defence of the Empire in a real emergency, their forces could be rapidly combined into one homogeneous Imperial Army'.

As regards naval defence, Canada decided to establish an auxiliary fleet and undertook the maintenance of the dockyards at Halifax and Esquimaux. Australia also preferred to lay the foundation of her own fleet, purchasing for that purpose three cruisers and three destroyers from English firms. New Zealand on the other hand agreed to contribute a subsidy of £100,000 a year, and a cruiser to a squadron of the new Pacific fleet. The latter was to consist of three units, one in the East Indies, one in the China Seas, one in Australian Waters. It was further agreed that the personnel of the Australian and Canadian fleets should be trained and disciplined under regulations similar to those established in the Royal Navy in order to allow of both interchange and union between the British and Dominion Services; and with the same object, that the standard of vessels and armaments should be uniform.

The practical result of these decisions, all of which were subsequently confirmed by the several Governments concerned, will be disclosed in a subsequent chapter.

The Conference which met in 1911 was, for more than one reason, memorable. The last of the series of conferences before the outbreak of the Great War, it was the first to meet under the new and more dignified appellation of The Imperial Conference. In the development of formal machinery it registered little progress; as a consultative assembly it attained unprecedented significance.

The Imperial  
Conference of  
1911

The Constitutional Resolution

The constitutional resolution stood in the name of New Zealand and was moved by Sir Joseph Ward, the Premier of that Dominion. The terms of the resolution (as amended in the course of the debate) were as follows :

'That the Empire has now reached a stage of Imperial development which renders it expedient that there should be an Imperial Council of State, with Representatives from all the self-governing parts of the Empire, in theory and in fact advisory to the Imperial Government on all questions affecting the interests of His Majesty's Dominions oversea.'

The atmosphere of the 1911 Conference was unquestionably, from an Imperial standpoint, ungenial; the audience, to which Sir Joseph Ward addressed himself, was unsympathetic not to say hostile; the speaker was not proof against the frequent and trenchant interruptions of the British Premier (Mr. Asquith) and the speech, with which the motion was introduced, failed to do justice to its important theme. Sir Joseph Ward seemed to be constantly shifting his sails to catch any breeze that might be passing, and he shifted them with conspicuous ill-success. The only result was to make the course of his argument curiously unsteady. The motion found no support, even from Australia and New Zealand. Consequently, Sir Joseph Ward was left in splendid isolation. Mr. Asquith himself took refuge in a constitutional *non possumus*:

'Sir Joseph Ward's proposal . . . would impair if not altogether destroy the authority of the Government of the United Kingdom in such grave matters as the conduct of foreign policy, the conclusion of treaties, the declaration and maintenance of peace, or the declaration of war, and, indeed, all those relations with Foreign Powers, necessarily of the most delicate character, which are now in the hands of the Imperial Government, subject to its responsibility to the Imperial Parliament. That authority cannot be shared, and the coexistence side by side with the Cabinet of the United Kingdom of this proposed body—it does not matter by what name you call it for the moment—clothed with the functions

and the jurisdiction which Sir Joseph Ward proposed to invest it with, would, in our judgement, be absolutely fatal to our present system of responsible government. . . . We cannot, with the traditions and the history of the British Empire behind us, either from the point of view of the United Kingdom or from the point of view of our self-governing Dominions, assent for a moment to proposals which are so fatal to the very fundamental conditions on which our Empire has been built up and carried on.'

From a debating point of view Mr. Asquith was able to score an easy victory ; but the edge of his argument was a good deal blunted by a communication which he made to the Conference in the first sentence of his speech. He had, as he informed them, received a memorial from some three hundred members of the Imperial House of Commons ' belonging to various parties in the State ' in the following terms :

' We the undersigned Members of Parliament, representing various political parties, are of the opinion that the time has arrived to take practical steps to associate the oversea Dominions in a more practical manner with the conduct of Imperial affairs, if possible, by means of an established representative council of an advisory character in touch with public opinion throughout the Empire.'

For once the House of Commons was prepared to move faster than the Imperial Conference. It is true and pertinent to add that the memorial of the House of Commons was in general terms, while Sir Joseph Ward attempted to descend to particulars. But the blunt truth is that the constitutional resolution did not, in 1911, have a fair chance, and under the circumstances it is regrettable that it was moved.

Deplorable as was the issue of the constitutional debate, the Conference of 1911 will remain for ever memorable in the history of Imperial unity by reason of the survey of the foreign policy of the Empire communicated in private to the members of the Conference by Sir Edward Grey (now Viscount Grey of Fallodon).

Secret  
Session,  
its signifi-  
cance,

Sir Edward Grey's communication was rendered the more impressive by the circumstances of the hour. The European atmosphere was highly charged with electricity. The outbreak of war had been hardly averted in 1905 by the resignation of M. Delcassé, the Foreign Minister of France—a resignation virtually dictated from Berlin. An even more serious crisis, again provoked by events in Morocco, arose in the summer of 1911. Again Germany sought to impose upon France in the eyes of the whole world a diplomatic humiliation, and to drive a wedge into the Triple Entente. Could war be a second time averted? At the moment when Sir Edward Grey was laying before the statesmen of the Empire an exhaustive analysis of the diplomatic situation no one could have answered that question with an assured affirmative.

What passed in that secret meeting of the Committee of Defence none, save those present, can tell. We can guess only from the impression obviously made upon those who were present, and from the speech of Mr Andrew Fisher, Prime Minister of the Commonwealth, who evidently expressed the thought of all.

'Hitherto,' he said, 'we have been negotiating with the Government of the United Kingdom at the portals of the household. You have thought it wise to take the representatives of the Dominions into the inner counsels of the nation, and frankly discuss with them the affairs of the Empire as they affect each and all of us. . . . I think no greater step has ever been taken or can be taken by any responsible advisers of the King.'

Mr. Asquith himself used similar language. 'I do not suppose there is one of us . . . who did not feel when that exposition of our foreign relations had been concluded that we realized in a much more intimate and comprehensive sense than we had ever done before the international position and its bearings upon the problem of government in the different parts of the Empire itself.' Referring also to the confidential discussion on defence, and the agreement resulting therefrom in regard to

co-operation for naval and military purposes, Mr. Asquith said:

'Our discussions conducted unnecessarily under the same veil of confidence in regard to co-operation for naval and military purposes have resulted, I think, in the most satisfactory agreement, which, while it recognizes our common obligation, at the same time acknowledges with equal clearness that those obligations must be performed in the different parts of the Empire in accordance with the requirements of local opinions and local need and local circumstances. Those, gentlemen, are matters as to which we cannot take the world into our confidence; we cannot even take our own fellow subjects and our own fellow citizens into our confidence in the full sense of the term. But we, who have gone into it with the frankness which such confidential discussions admit of, will agree that even if the Conference had done no more than that it would have been a landmark in the development of what I may call our Imperial constitutional history.'<sup>1</sup>

In view of these and similar declarations it is not unsafe to surmise that the instant and, as it seemed, almost intuitive apprehension, on the part of the Dominions, of the points at issue in the European War was due, in no small degree, to the precise and accurate grasp of the diplomatic situation which they had obtained, at first hand, during the Conference of 1911.

Of the discussions subsequently made public the most important was that upon International Agreements in general, and in particular upon the Declaration of London. That Declaration, embodying the new rules in regard to contraband decided upon at the Hague Conference of 1907, profoundly affected the position of the dominant Sea-Power and its Sea-Empire; but, apart from the merits, the Dominions held that, in a matter so closely affecting them, they ought to have been consulted. Consequently, on 1 June Mr. Fisher moved: 'That it is regretted that the Dominions were not consulted prior to the acceptance by the British Delegates of the terms

The Empire and International Agreements

<sup>1</sup> *Minutes of Proceedings*, Cd. 5745, p. 440.

of the Declaration of London. . . .’ Upon that motion Sir Edward Grey spoke,<sup>1</sup> and on 2 June the Conference resolved :

‘ That this Conference after hearing the Secretary of State for Foreign Affairs cordially welcomes the proposals of the Imperial Government, viz. : (a) that the Dominions shall be afforded an opportunity of consultation when framing the instructions to be given to British delegates at future meetings of the Hague Conference, and that Conventions affecting the Dominions provisionally assented to at that Conference shall be circulated among the Dominion Governments for their consideration before any such Convention is signed ; (b) that a similar procedure where time and opportunity and the subject matter permit shall, as far as possible, be used when preparing instructions for the negotiations of other International Agreements affecting the Dominions.’

The discussion was on a high plane, and in the course of it very serious objection was taken to the autocratic procedure of the Home Government in reference to Treaties which vitally concern the interests of the Dominions. Even General Botha, who throughout the Conference invariably spoke with characteristic modesty and marked consideration for the Home Government, was constrained, on this matter, to express his ‘ profound conviction that it is in the highest interest of the Empire that the Imperial Government should not definitely bind itself by any promise or agreement with a foreign country which may affect a particular Dominion, without consulting the Dominion concerned’. The sentiments of General Botha were the sentiments of all the self-governing Dominions. Nor did their misgivings lack justification. Nevertheless there can be no question that the broad result of the Conference of 1911 conduced to a better understanding between Great Britain and the sister-nations. The discussions were frank almost to the verge of brutality ; but confidence begot confidence. The

<sup>1</sup> This speech, which will be found in *Minutes of Proceedings*, Cd. 5745, pp. 103-15, is quite distinct from the general survey of foreign affairs made *in camera* to the Committee of Defence.

precise knowledge of the facts which on dispersion the delegates carried back with them to their several Dominions necessarily involved a measure of responsibility. The status of dependency was exchanged for that of partnership, and when the crisis came they were not taken unawares.

Such was the stage which the Conference had reached in its constitutional evolution when the Empire was called to arms. The results thus far achieved were cautiously estimated by one who combined in unique degree historical erudition and experience of affairs:

'Nothing could be more in harmony with the British instinct and British methods of construction than the evolution of the Imperial Conference and its concomitants. Twenty-five years have elapsed since the first meeting of the kind took place without any system of any kind or any rule as to representation, and at the present moment the Imperial Conference is a well defined, fully understood, and fully recognized machinery, the meetings being held at stated intervals, and each meeting resulting in a step forward in the direction of Imperial unity. The wonder is that it has developed so rapidly . . . any attempt to stimulate its growth by hothouse methods would be disastrous. . . . It is . . . not only inexpedient but absolutely impossible to build up the future except by slow degrees if the building is to endure.'<sup>1</sup>

A momentous question remained. Would the machinery, still rudimentary, stand the strain of a great crisis; would the ties, still 'light as air', prove strong enough to hold the Commonwealth together through the suffering and sacrifice of a great war? The years 1914-18 supplied the answer.

<sup>1</sup> Sir C. P. Lucas, *Greater Rome and Greater Britain* (1912), pp. 173-4.





## NII. THE MACHINERY OF IMPERIAL CO-OPERATION

### *The War and the Empire*

'The first shot fired in a great European war will be the signal for the dissolution of England's loosely compacted Empire.'—GENERAL BERNHARDI.

'The whole course of human affairs has been altered because the British Empire has been proved to be a fact and not, what a good many people who knew nothing about it imagined, a fiction. . . . There is no doubt at all that the events of the last few years have consolidated the Empire in a way which probably generations would not have done otherwise.'—D. LLOYD GEORGE, 18 August 1921.

ENGLAND is the realm of eternal paradox. To every foreigner, even the most sympathetic and the best informed, the character of her people is inscrutable, and her political institutions are almost unintelligible. Her success is indeed unquestionable ; but what is the secret of it ? Has it been due to mere blind chance ; to the favour of an over-partial Providence, or to profound but carefully veiled calculation ? She disclaims with apparent sincerity territorial ambitions ; yet every decade she adds to her oversea possessions. She confers upon her dependencies, avowedly with a view to preparing them for complete independence, the largest measure of autonomy ; but year by year the ties between them are strengthened and multiplied. What wonder that her diplomatists should be charged with perfidy and her people be denounced as hypocrites ? For her policy is apt to disconcert friends and to disappoint enemies.

The realm of paradox

No enemy of England was ever more cruelly disappointed than was Germany in 1914. The German plan of attack was based upon two assumptions : first, that England was too unprepared and too much distracted by domestic difficulties to go to the assistance of France,

The miscalculation of Germany

and consequently that Germany would be able to march into Paris and dictate terms to a vanquished France before she had to tackle the real enemy ; secondly, that when England's turn came, England would have to fight Germany without allies, and above all without assistance from the sister-nations and the Dependencies oversea.

The military party at Potsdam had accepted without question Bernhardt's confident assurance that the first shot fired in a great European war would be the signal for the dissolution of England's 'loosely compacted Empire'.

'All the Colonies', he wrote, 'which are directly subject to English rule are primarily exploited in the interest of English industries and English capital. The work of civilization which England undeniably has carried out among them has always been subordinated to this idea ; she has never justified her sovereignty by training up a free and independent population and by transmitting to the subject peoples the blessings of an independent culture of their own. With regard to those Colonies which enjoy self-government and are therefore more or less free Republics, as Canada, Australia, South Africa . . . it seems uncertain at the present time whether England will be able to include them permanently in the Empire, to make them serviceable to English industries or even to secure that the national character is English.'<sup>1</sup>

It is only fair to add that before the war had proceeded very long one of the most candid of German publicists, with a clear apprehension of the truth, frankly admitted the cruel disillusionment which his countrymen had suffered.

'The unsystematic character of English Imperialism has often been pointed to as a deficiency by theoretical critics among the Germans, and people believed that the loosely constructed building would break in pieces by reason of the superficiality of the link between its many members. But the war has shown, in this case too, that loose threads, when they are properly put together, can hold fast. The Empire geographically so varied spread out on every coast has remained a unity.'

<sup>1</sup> *Germany and the Next War* (Eng. trs.), pp. 79-80.

And again, 'One of the facts that have become evident in the war is that Australia, South Africa, and Canada are English in will and feeling. They have their own provincial pride and their inalienable autonomy, but they wish to remain independent parts of greater Britain.'<sup>1</sup>

Although the anticipations of Potsdam were destined to disappointment, the war did reveal grave defects in the constitutional machinery of the British Empire. The spirit by which the body politic was infused could not have been better; the practical results could hardly have been improved; the mechanism could hardly have been worse. — The question may possibly obtrude itself: Might not the spirit have been worse had the machinery been better? Given the peculiar genius of Englishmen, might not over-much thought for the morrow have defeated its own purpose? Was not spontaneity of the essence of success? Such questions cannot be lightly brushed aside, but the answer must be deferred. The present chapter is primarily concerned with the development of the machinery of Imperial co-operation during the period of the Great War.

At midnight on 3 August 1914, the whole Empire was involved in war by the action of the Imperial Government. At one minute after midnight Germany would have been as much entitled to bombard Halifax, Vancouver, Cape Town, or Sydney as to bombard Chatham or Portsmouth. Upon this point it is necessary to lay some emphasis. The actual participation of the Dominions in the war was wholly voluntary; there was no legal obligation resting upon them to contribute one man or one shilling; the amount of their contribution in men and money was entirely within their own discretion. But their legal implication in the war was involuntary. New Zealand could no more escape the consequences of Great Britain's declaration of war than could Scotland; Canada no more than Ireland. Neutrality was legally impossible. War was declared for the Empire and in one way only could

The Em-  
pire at  
war

Legal  
position  
of the Do-  
minions

<sup>1</sup> Dr. Friedrich Naumann, *Mittel Europa*, pp. 184-206.

any single unit of the Empire escape responsibility for the decision of the Imperial Government ; by formal secession. To remain in the Empire and to maintain neutrality was a legal impossibility.

That Germany would have hesitated to push any of the Dominions or Dependencies into this dilemma is likely enough ; virtual neutrality would have served her purpose ; and that she counted upon this, if upon no more, is unquestionable. Nor would the British Government have been quick to strain the legal point. No attempt was made to put any pressure upon the Dominions ; nor was any request made to them for any form of assistance, financial, naval or military. When the offers of assistance came from the Dominions—and they came with the utmost promptitude—they were naturally accepted by the Home Government with cordiality and gratitude. But we must repeat that while the offers of aid were spontaneous, the legal implication in war was involuntary.

Attitude  
of the Do-  
minions :  
South  
Africa

In no part of the Empire, except in South Africa, was there any hesitation to come forward with offers of assistance, still less to evade the legal responsibility of war ; and even in South Africa the Union Ministers accepted, as early as 10 August 1914, the suggestion of the Imperial Government that they should promptly attack German South-West Africa. Nor was the Legislature slow to support the action of the Executive. The House of Assembly, ' fully recognizing the obligations of the Union as a portion of the British Empire ', passed a humble address assuring His Majesty of ' its loyal support in bringing to a successful issue the momentous conflict which has been forced upon him in defence of the principles of liberty and of international honour, and of its whole-hearted determination to take all measures necessary for defending the interests of the Union and for co-operating with His Majesty's Imperial Government to maintain the security and integrity of the Empire ' ; and, further, requesting His Majesty to convey to the King of the

Belgians sympathy with the Belgian people in their struggle. To this motion an amendment was proposed by Mr. Hertzog that 'This House being fully prepared to support all measures of defence which may be necessary to resist any attack on Union territory is of opinion that any act in the nature of an attack or which may lead to an attack on German territory in South Africa would be in conflict with the interests of the Union and of the Empire'. The amendment, however, found only twelve supporters, of whom nine came from the Orange Free State, as against ninety-two who supported the Government. With subsequent developments in South Africa this narrative is not concerned, though it is pertinent to remember that only in South Africa and in Ireland was opposition to the policy, which commended itself to the general sense of the Empire, carried to the length of armed rebellion. Before the war closed, South Africa had contributed, in addition to 44,000 coloured and native troops who were enlisted in labour brigades, no fewer than 76,184 men or 11·12 per cent. of her total male white population.

The Government of the Australian Commonwealth informed the Imperial Government as early as 3 August of its readiness to dispatch a force of 20,000 men, and the first contingent actually left Australia on 1 November. In the course of the war 331,814 men or a proportion of no less than 13·43 per cent. of the male population were raised. New Zealand was equally prompt and even more generous in its contribution. The Dominion raised 112,223 men, being 19·35 per cent. of the total male population. Canada's contribution, though the percentage was greatly diminished by the reluctance of the French Canadians to military service, amounted to the magnificent total of 458,218 men.<sup>1</sup>

Australia,  
New Zealand,  
and  
Canada

One other point requires to be emphasized. If the co-

<sup>1</sup> For purposes of comparison, it may be mentioned that the total forces of the United Kingdom amounted to 5,704,416, or a percentage of serving troops to population of 25·36, or 27·28 if Ireland with its disproportionately small contribution be omitted.

Attitude  
of  
Imperial  
Govern-  
ment

operation of the Dominions was as spontaneous as it was superb, if their legal implication in the war was inevitable, the Imperial Government were scrupulously careful to respect the autonomy of the Dominions. The legal position required that British subjects throughout the Empire should be warned that by contributing to German loans or making contracts with the German Government they would render themselves liable to the penalties of high treason as abetting the King's enemies. Similarly, the whole Empire was included within the scope of the Proclamations and Orders in Council, 'dealing with the days of grace allowed for the departure of German merchant vessels from British ports throughout the Empire, the carriage of contraband of war by British ships between foreign ports, the definition from time to time of contraband goods, and the operation with restrictions of the Declaration of London and its final abandonment in favour of more rigid rules of war'.<sup>1</sup> Prize courts in the Dominions were also called into activity to exercise their jurisdiction under Imperial enactments, and the procedure in prize cases was regulated by Acts passed by the Imperial Legislature in 1914 and 1915. But, as Dr. Keith properly insists, Dominion autonomy was respected in all matters where it was possible. Thus the restrictions imposed on the transfer of ships from British ownership by Acts of 1915 and 1916 were not extended to British ships registered in the Dominions. Again, persons who, though resident for a time in Great Britain, were ordinarily resident in the Dominions were explicitly excluded from the Conscription Acts (1916-18). Even more remarkable was the abstention on the part of the Imperial Government from any interference with the discretion of the Dominions in regard to the conduct of their military

<sup>1</sup> A. B. Keith, *War Government of the British Dominions*, p. 20. Oxford: at the Clarendon Press (1921). Published on behalf of the Carnegie Endowment for International Peace. In this work Dr. Keith contributes yet another to the series of masterly and penetrating studies which in recent years have done so much to elucidate the Constitutional relations of the several parts of the Empire.

expeditions and their occupation of enemy territory. Thus it was General Botha who decided the terms on which the German forces in South Africa laid down their arms, and it was Australian and New Zealand officers respectively who arranged the terms of the capitulation of German New Guinea and Samoa. There are those who think that in these and similar matters the Imperial Government carried the policy of non-interference to unreasonable lengths, but at least it cannot be denied that the most scrupulous regard was shown alike for the rights and the susceptibilities of the younger communities oversea. If the confidence of the Dominion Governments had been won by the frank disclosure and discussion which took place in London in 1911, if their prompt and spontaneous co-operation in the war was in no small degree attributable to the precise information then vouchsafed to them, the most sensitive could hardly fail to be reassured by the policy pursued by the Imperial Government throughout the whole course of the war and during the peace negotiations.

Nevertheless, the machinery of co-operation proved itself, during the war, to be lamentably defective. Nor was there, on this point, any illusion among the leading statesmen of the Dominions. Speaking early in the war at Winnipeg, Sir Robert Borden said: 'It is impossible to believe that the existing status, so far as it concerns the control of foreign policy and extra-Imperial relations, can remain as it is to-day.' 'These pregnant events', he said in December 1915, 'have already given birth to a new order. It is realized that great policies and questions which concern and govern the issues of peace and war cannot in future be assumed by the people of the British islands alone.' In language not less emphatic and more picturesque, Mr. Doherty, the Minister of Justice, spoke to similar purpose at Toronto :

Defective  
machin-  
ery

'Our recognition of this war as ours, our participation in it, spontaneous and voluntary as it is, determines absolutely once for all that we have passed from the status of the



protected colony to that of the participating nation. The protected colony was rightly voiceless; the participating nation cannot continue so. The hand that wields the sword of the Empire justly holds the sceptre of the Empire; while the Mother Country alone wielded the one, to her alone belonged the other. When, as to-day, the nations of the Empire join in wielding that sword, then must they jointly sway that sceptre.'

Australia and New Zealand re-echoed the voice of Canada. 'There must be a change and it must be radical in its nature', declared Mr. Hughes. Mr. Fisher and Sir Joseph Ward spoke with similar emphasis, and the same point was driven home in England by Mr. Bonar Law:

'It is not a possible arrangement that one set of men should contribute the lives and treasure of their people and should have no voice in the way in which those lives and that treasure are expended. That cannot continue. There must be a change.'

Bluntly put, the warning uttered by the Dominions to the Homeland amounted to this:

'You have involved us in war without consulting us; we have come into it and waged it with all our might; we know that the cause in which we fight is righteous; we are prepared to send our last man and to spend our last shilling; you can count upon us to the end, but—be it understood—"never again"; complete self-government involves something more than the control of our own domestic affairs, it means at least a voice in the conduct of the foreign policy of the whole Empire.'

The plea was irresistible and the warning was not unheeded. The pity was that it had not been heeded twenty years earlier, and that response was delayed until all the grace of it had evaporated. But it came at last.

The first act of the Government which came into power in England in December 1916 was to invite the Prime Ministers of the Dominions and representatives of India

to visit England in 1917, and to become members, for the time being, of the War Cabinet.

The invitation was addressed to the Dominions on behalf of His Majesty's Government by Mr. Walter (afterwards Viscount) Long, then Secretary of State for the Colonies, and in issuing it Mr. Long wrote :

' I wish to explain that what His Majesty's Government contemplate is not a session of the ordinary Imperial Conference but a special War Conference of the Empire. They, therefore, invite your Prime Minister to attend a series of special and continuous meetings of the War Cabinet, in order to consider urgent questions affecting the prosecution of the war, the possible conditions on which, in agreement with our Allies, we could assent to its termination and the problems which will then immediately arise. For the purpose of these meetings your Prime Minister would be a member of the War Cabinet.'

The proposed status to be accorded to the representatives of the Dominions could not have been more clearly defined.

The invitation was accepted by all the Dominions as well as by India, and on 20 March 1917—a date destined to be memorable in the history of the British Empire—the Imperial War Cabinet met for the first time. It consisted, firstly, of the members of the War Cabinet or Directory: the Right Hon. D. Lloyd George, Prime Minister, the Right Hon. Earl Curzon of Kedleston, the Right Hon. Viscount Milner, and the Right Hon. Arthur Henderson, Ministers without portfolio, and the Right Hon. A. Bonar Law, Chancellor of the Exchequer and Leader of the House of Commons. Canada was represented by the Right Hon. Sir Robert Borden, Prime Minister, and Sir George Perley, Minister of the Overseas Military Forces, who were 'accompanied' by the Hon. Robert Rogers, Minister of Public Works, and the Hon. J. D. Hazen, Minister of Marine, but the two last mentioned were not strictly 'members' of the Cabinet. Australia was at the last minute prevented, by the imminence of a general election, from sending any representative,

but New Zealand was represented by the Right Hon. W. F. Massey, Prime Minister, and the Right Hon. Sir J. G. Ward, Minister of Finance. General Botha, the Prime Minister, could not leave South Africa but the Union was represented by the Right Hon. J. C. Smuts, Minister of Defence, and Newfoundland by the Right Hon. Sir E. P. Morris, Prime Minister. India was represented by the Secretary of State for India, the Right Hon. Austen Chamberlain, who was 'accompanied' by three assessors: the Hon. Sir J. S. (now Lord) Meston, K.C.S.I., Lieutenant-Governor of the United Provinces; Colonel His Highness the Maharajah Sir Ganga Singh Bahadur, G.C.S.I., G.C.I.E., Maharajah of Bikaner; and Sir S. P. (now Lord) Sinha, Member Designate of the Executive Council of the Governor of Bengal. The Right Hon. W. H. Long, who had issued the invitations on behalf of the Government was, *ex officio*, a member of the Imperial War Cabinet and spoke on behalf of the Crown Colonies and Protectorates.<sup>1</sup>

This Imperial War Cabinet was summoned specifically to consider 'urgent questions affecting the prosecution of the war, the possible conditions (of peace) and the problems which will then immediately arise'. Its constitutional status and political functions were defined with precision by Earl Curzon. Speaking as leader of the House of Lords he said:

'The representatives are not coming here to endeavour to construct a brand-new Constitution for the British Empire. The capacity in which they come, however, does constitute a remarkable forward step in the constitutional evolution of the Empire. They are not coming as members of an Imperial Conference of the old style. They are coming as members for the time being of the Governing body of the British Empire. This seems to me the greatest step ever taken in recognizing the relations of the Dominions and ourselves on a basis of equality. . . . The War Cabinet is for a purpose being expanded into an Imperial Council.'<sup>2</sup>

<sup>1</sup> *War Cabinet Report for 1917* (Cd. 9005), pp. 1, 6-7.

<sup>2</sup> *House of Lords Official Report*, 7 February 1917.

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Lord Curzon's language is at once cautious, precise, and hopeful; nor can the significance of the experiment thus outlined be denied. But the question remains: How far did the Imperial War Cabinet fulfil the anticipations of those who had the wit to summon it?

This question is more easily asked than answered. Reports of the War Cabinet for 1917 and 1918—the publication of which in itself marks a notable innovation in constitutional practice—reveal more of the arcana of the constitution than has ever been revealed before; yet, even so, we can estimate results only from the formal utterances of the statesmen actually engaged in the experiment. The most important of these statements was made by the Prime Minister in the House of Commons (17 May 1917):

'It is', said Mr. Lloyd George, 'desirable that Parliament should be officially and formally acquainted with an event that will constitute a memorable landmark in the constitutional history of the British Empire. . . . The British Cabinet became for the time being an Imperial War Cabinet. While it was in session its Overseas members had access to all the information which was at the disposal of His Majesty's Government and occupied a status of absolute equality with that of the members of the British War Cabinet. . . . So far as we are concerned we can say with confidence that the experiment has been a complete success. . . . The Imperial War Cabinet were unanimous that the new procedure had been of such service not only to all its members, but to the Empire that it ought not to be allowed to fall into desuetude.'

Accordingly, it was resolved that an Imperial War Cabinet, consisting of 'the Prime Minister of the United Kingdom, and such of his colleagues as deal specially with Imperial affairs, of the Prime Ministers of the Dominions or some specially accredited alternate possessed of equal authority' and of a representative of India should meet annually or more often if occasion demanded. Mr. Lloyd George concluded with expressing the hope, common to his colleagues and himself that 'the holding of an annual Imperial Cabinet to discuss foreign affairs

Reports  
of the  
War  
Cabinet

and other aspects of Imperial policy will become an accepted convention of the British Constitution'.

✓ The utterances of Dominion representatives entirely corroborated the impression conveyed by the Premier's announcement. Sir Robert Borden, for instance, in an address to the Empire Parliamentary Association (3 April 1917) was, if anything, even more explicit:

'We meet there (in the Imperial Cabinet) on terms of equality under the presidency of the First Minister of the United Kingdom; we meet there as equals; he is *primus inter pares*. Ministers from six nations sit around the council board, all of them responsible to their respective parliaments and to the people of the countries which they represent. Each nation has its voice upon questions of common concern and highest importance as the deliberations proceed; each preserves unimpaired its perfect autonomy, its self-government, and the responsibility of its ministers to their own electorate. For many years the thought of statesmen and students in every part of the Empire has centred around the question of future constitutional relations; it may be that now as in the past the necessity imposed by great events has given the answer.'<sup>1</sup>

The passage here quoted was rightly deemed sufficiently significant to be reproduced in the official Report of the War Cabinet for 1917; but it by no means stood alone. The character of the experiment, the form of procedure, above all, the complete success of the new departure in constitutional practice, rest upon irrefutable testimony. As Sir Robert Borden himself well put it: 'With that new Cabinet a new era has dawned and a new page of history has been written.'

An embryonic Imperial Executive

Thus, for two months in the spring of 1917, the Empire did actually possess a real Imperial Executive in embryo. Regarded as a makeshift for the purposes of the war, nothing could have been better. But the question remains: How far did that experiment go towards solving the constitutional problem of the Commonwealth? Plainly, if the Empire Cabinet or something on these

<sup>1</sup> Sir Robert Borden, *The War and the Future*, p. 144.

lines were to become part of the permanent machinery of the Government of the Empire, considerable modifications would be found necessary. In the first place, the composition of the first Imperial War Cabinet left much to be desired. To exclude from such a Cabinet the Secretary of State for War, or the First Lord of the Admiralty or a Minister of Imperial Trade and Communications would, in ordinary times, and under ordinary circumstances, be grotesque. Under a genuine Federal Constitution the Executive Authority would naturally be entrusted, assuming that the principle of Federalism were combined with the principle of Parliamentary Government, to seven or eight ministers who would be the heads of Imperial departments and who might be drawn indifferently from the statesmen of the Homeland or the Dominions. If, on the other hand, constitutional evolution is for the time being to stop short at a Federal Executive it would be in better accord, alike with the facts of the situation and with the spirit of the Constitution, that the Empire Cabinet should consist mainly, if not exclusively, of ministers without portfolio. The English genius would find it difficult to conceive of heads of Administrative Departments who were not responsible to a legislature. To this point we shall return.

The experiment tried in 1917 was, however, so far successful that it was repeated in 1918; but with important differences. This second session lasted from June 11 until July 30, and was attended not only by the Prime Minister and the other Members of the War Cabinet, but by the Secretaries of State for Foreign Affairs, for the Colonies, for India, for War, and for the Royal Air Force, and by the First Lord of the Admiralty. Australia, unrepresented in 1917 owing to a general election, was represented by the Prime Minister of the Commonwealth (Mr. Hughes) and by the Minister of the Navy (Sir J. Cooke); Newfoundland, by its Premier (Mr. W. F. Lloyd); Canada by Sir Robert Borden and by the President of the Privy Council (Mr. M. W. Rowell); New

Imperial  
War  
Cabinet  
of 1918

Zealand by Mr. Massey and Sir J. Ward ; the Union of South Africa by General Smuts and Mr. H. Burton ; and India by the Secretary of State, by the Maharajah of Patiala as 'the spokesman of the Princes of India', and by Sir S. P. (now Lord) Sinha, who was 'deputed to this country as the representative of the people of India'.

Not only in composition did the Empire Cabinet of 1918 differ from that of 1917. The scope and competence of the Cabinet was also enlarged. The official record intimates that its deliberations were not confined to the all-absorbing military problems, but covered the whole field of Imperial policy, including many aspects of foreign policy and the war aims for which the British-Commonwealth was fighting. How absorbing the military problems were is sufficiently indicated by the dates of the session. Between March and July in that fateful summer the Germans on the Western front launched four terrific attacks: the first, opening on 1 March near St. Quentin, pierced the Anglo-French line and brought the Germans close to Amiens; the second was launched on 9 April to the south of Ypres; the third, opening on 26 May, brought the Germans once more on to the Marne; in the fourth, which began on the 15th of July, the German Army was permitted by Marshal Foch, now Generalissimo, to cross the Marne. Three days later Foch let loose his reserves, the Germans were driven back with heavy loss, and on 8 August the British counter offensive, destined to be final and conclusive, began. Before the second session of the Empire Cabinet ended, the tide of battle had already begun to turn, and the character of the problems to be considered underwent in consequence some change. So also did the status of its members. 'The overseas members of the Imperial War Cabinet, not only helped to settle the policy to be adopted by the British Government at the session of the Allied Supreme Council in July, but also attended one of the meetings of the Supreme War Council in person.'<sup>1</sup>

<sup>1</sup> *Report of War Cabinet for 1918*, pp. 10.

Not only was the competence of the Cabinet extended, but its machinery was elaborated. Before it adjourned a resolution was adopted, in accordance with the suggestion made at the Imperial Conference of 1911, that henceforward the Prime Ministers of the Dominions should have the right, as Members of the Empire Cabinet, to communicate directly with the Prime Minister of the United Kingdom and vice versa. Such communications were to be confined to questions of Cabinet importance, but it was expressly provided that the Prime Ministers themselves were to be the judges of such questions. Telegraphic communications between the Prime Ministers were as a rule to be conducted through the machinery of the Colonial Office; moreover it was laid down that this rule was not to exclude, should the circumstances be deemed exceptional, the adoption of more direct means of communication. Another point of great importance was also dealt with by formal resolution. The experience of the period between the adjournment of the first session (May 1917), and the meeting of the second (June 1918), sufficed to demonstrate 'the practical inconvenience resulting from the fact that while the Prime Ministers of the Dominions could only attend the Imperial War Cabinet for a few weeks in the year, matters of the greatest importance from the point of view of the common interest inevitably arose and had to be decided in the interval between the sessions'. The natural remedy for this defect lay in giving the Imperial War Cabinet continuity by the presence in London of Oversea Cabinet Ministers definitely nominated to represent the Prime Ministers in their absence. Consequently, the following resolution was adopted: 'In order to secure continuity in the work of the Imperial War Cabinet and a permanent means of consultation during the war on the more important questions of common interest, the Prime Minister of each Dominion has the right to nominate a Cabinet Minister either as a resident or visitor in London to represent him at meetings of the Imperial War Cabinet



to be held regularly between the Plenary sessions.' It was also decided that arrangements should be made for the representation of India at those meetings.<sup>1</sup>

Before this resolution could take effect the military collapse of the Central Powers—unexpectedly rapid and complete—precipitated the summoning of the Peace Conference in Paris. That Conference marked the accomplishment of a further stage in the evolution of Colonial nationalism, if not of Empire organization. It may be well, therefore, at this point to pause to estimate the results actually achieved during the two last years of the war.

As regards the Imperial Executive the results were accurately estimated in a speech delivered by Sir Robert Borden to the Empire Parliamentary Association on the 21st of June 1918. The statement then made received a quasi-official *inprimatur* by its reproduction in the *Report of the War Cabinet for 1918*.<sup>2</sup>

'A very great step in the constitutional development of the Empire was taken last year by the Prime Minister when he summoned the Prime Ministers of the Overseas Dominions to the Imperial War Cabinet. . . . We meet as Prime Ministers of self-governing nations. . . . But we have always lacked the full status of nationhood, because you exercised here a so-called trusteeship, under which you undertook to deal with foreign relations on our behalf, and sometimes without consulting us very much. Well, that day has gone by. . . . It has been said that the term "Imperial War Cabinet" is a misnomer. The word "Cabinet" is unknown to the law. The meaning of "Cabinet" has developed from time to time. For my part I see no incongruity whatever in applying the term "Cabinet" to the association of Prime Ministers and other Ministers who meet around a common council board to debate and to determine the various needs of the Empire. If I should attempt to describe it, I should say it is a Cabinet of Governments. Every Prime Minister who sits around that board is responsible to his own Parliament and to his own people; the conclusions of the War Cabinet can only be carried out by the Parliaments of the different nations of our

<sup>1</sup> *Report of War Cabinet for 1918*, p. 10.

<sup>2</sup> *Ibid.*, pp. 7-8.

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Imperial Commonwealth. Thus, each Dominion, each nation, retains its perfect autonomy. I venture to believe, and I thus expressed myself last year, that in this may be found the genesis of a development in the constitutional relations of the Empire, which will form the basis of its unity in the years to come.

Sir Robert Borden's words, and still more the official endorsement of them, are on several grounds remarkable. The assertion of 'perfect equality' as between the motherland and the Dominions; the implied claim to the 'full status of nationhood'; the denial of executive competence to the Imperial War 'Cabinet'; above all the suggestion that in such a 'Cabinet', endowed neither with executive nor with legislative authority, would be found the safest line of 'development in the constitutional relations of the Empire'—all this seemed to close one door and to open wide another: to repudiate by implication the federal solution of the Imperial problem and to put forward as a preferable alternative the idea of a confederacy of Free Commonwealths.

The same idea had been expressed, even more explicitly and with even greater emphasis, by General Smuts at the Imperial Conference of 1917, and to the work of that Conference we must now briefly refer.

Under a resolution adopted at the Conference of 1907 The Imperial War Conference, 1917 meetings of the Imperial Conference were to be held quadrennially. A conference met accordingly in 1911 and another was due in 1915, but in February of that year Mr. Harcourt, then Secretary of State for the Colonies, announced that in consultation with all the Dominions it had been decided that it was undesirable to 'hold the normal meeting of the Imperial Conference' in 1915. The Dominions acquiesced in this decision, the more readily after receiving an assurance that it was the intention of the Imperial Government to consult the Dominion Premiers 'most fully and, if possible, personally when the time arrives to discuss possible terms of peace'. That intention was more than fulfilled.

The special Imperial War Conference sat side by side with the Imperial War Cabinet. As regards the representatives of the Dominions and India the personnel of the two bodies was identical. The members of the British War Cabinet did not, however, attend the Conference which met at the Colonial Office under the presidency of Mr. Walter Long. As a rule the two bodies met on alternate days, the Conference being concerned with 'non-war problems, or questions connected with the war, but of lesser importance'.<sup>1</sup> A great part of the proceedings was of a 'highly confidential character and entirely unsuitable for publication at any rate during the war',<sup>2</sup> but extracts from the Minutes of Proceedings and some of the resolutions adopted were promptly published. Of those resolutions by far the most significant was that on the Constitution of the Empire adopted, apparently with unanimity, on 16 April. After amendment and as finally adopted it ran as follows :

Constitutional  
Resolution of  
16 April

'The Imperial War Conference are of opinion that the readjustment of the constitutional relations of the component parts of the Empire is too important and intricate a subject to be dealt with during the War, and that it should form the subject of a special Imperial Conference to be summoned as soon as possible after the cessation of hostilities.

'They deem it their duty, however, to place on record their view that any such readjustment, while thoroughly preserving all existing powers of self-government and complete control of domestic affairs, should be based upon a full recognition of the Dominions as autonomous nations of an Imperial Commonwealth, and of India as an important portion of the same, should recognize the right of the Dominions and India to an adequate voice in foreign policy and in foreign relations, and should provide effective arrangements for continuous consultation in all important matters of common Imperial concern, and for such necessary concerted action, founded on consultation, as the several Governments may determine.'<sup>3</sup>

The terms of this historic resolution call for close

<sup>1</sup> *War Cabinet Report*, p. 7.

<sup>2</sup> *Minutes*, &c. (Cd. 8566), p. 3.

<sup>3</sup> *Minutes*, p. 61.

scrutiny. Contemporary criticism acclaimed it, with satisfaction or chagrin according to the temper of the critic, as definitely closing the door upon what is known as the federal solution. Thus Mr. (now Sir) Sidney Low expressed with characteristic lucidity the thought that was in many minds :

' This . . . places the federal solution out of court for the present. The overseas statesmen who have concurred in the establishment of the Empire Executive do not expect or intend that their work shall be consummated by parliamentary federation. They are not federalists, but autonomists ; and they do not regard an Imperial Congress or Parliament as consistent with their ideal of national self-expression and self-development . . . and if their opinion is shared, as it probably is, by the majority of their fellow-citizens, the reorganization of the Empire under a supreme central Parliament must be ruled out of consideration for the near future.' <sup>1</sup>

Even more important, because more authoritative, were the words used by General Smuts in commending the resolution to the Imperial Conference. General Smuts, though not devoid of the Imperial instinct, is primarily an autonomist or nationalist. The collected edition of the speeches made by him in England, in 1917, to go no farther, makes his position perfectly clear. Those speeches lay stress upon several points of outstanding importance. The first is that an instrument, or written constitution, is alien to the spirit of British Constitutional development :

' While your statesmen may be planning great schemes of union for the future of the Empire, my feeling is that the work is already largely done. The spirit of comradeship which has been born in this War and on the battlefields of Europe among men from all parts of the Empire will be far more powerful than any instrument of government we can erect in the future . . . the instrument of government will not

<sup>1</sup> *The Imperial Constitution : the New Phase. The Nineteenth Century and After*, August 1917.

be a thing that matters so much as the spirit which actuates the whole.' <sup>1</sup>

A second point was the absolute equality of the constituent States of the Commonwealth :

'The Governments of the Dominions as equal Governments of the King will have to be recognized far more fully than that is done to-day.' <sup>2</sup>

A third point was their complete autonomy :

'The young nations are developing on their own lines; the young nations are growing into Great Powers; and it will be impossible to attempt to govern them in future by one common Legislature and one common Executive. . . . We are a system of nations. We are not a State, but a community of States and nations.' <sup>3</sup>

Most emphatic of all his points was the supreme importance of maintaining unbroken the golden link of the Crown :

'How', he asks, 'are you going to keep this commonwealth of nations together? If there is to be this full development towards a more varied and richer life among our nations, how are you going to keep them together? It seems to me that there are two potent factors that you must rely upon for the future. The first is your hereditary Kingship, the other is our Conference system. I have seen some speculations recently in the newspapers about the position of the Kingship in this country, speculations by people who, I am sure, have not thought of the wider issues that are at stake. You cannot make a republic of the British Commonwealth of nations.' <sup>4</sup>

The emphasis laid by General Smuts upon the importance of the Monarchy served, however, to give additional significance to the language which he used in regard to the constitutional resolution proposed at the Conference :

'If this resolution is passed, then one possible solution is negatived, and that is the federal solution. The idea of a future Imperial Parliament and a future Imperial Executive

<sup>1</sup> Cf. *The British Commonwealth of Nations*, a speech delivered in the Royal Gallery at the House of Lords (15 May 1917), *War Time Speeches*, pp. 28, 37.

<sup>2</sup> *Ibid.*, p. 15.

<sup>3</sup> *Ibid.*, pp. 17, 31.

<sup>4</sup> *Ibid.*, p. 34.

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is negated by implication by the terms of this resolution. The idea on which this resolution is based is rather that the Empire will develop on the lines upon which it has developed hitherto; that there will be more freedom and equality in all its constituent parts; that they will continue to legislate for themselves and continue to govern themselves; that whatever executive action has to be taken, even in common concerns, would have to be determined, as the last paragraph says, 'by the several Governments' of the Empire, and the idea of a federal solution is therefore negated, and, I think, very wisely, because it seems to me that the circumstances of the Empire entirely preclude the federal solution.'

It must of course be recognized that in these utterances Sir General Smuts was speaking only for himself, and that Sir Robert Borden in the last-quoted extract he was manifestly anxious to put his own gloss upon the resolution about to be adopted by the Conference. The emphasis of his colleagues was in a somewhat different place. Sir Robert Borden, for example, who proposed the resolution, while equally insistent upon the complete recognition of the Dominion as autonomous nations in the Imperial Commonwealth, laid stress upon the fact that the resolution primarily affirmed that the readjustment of the constitutional relations was a question which must be dealt with as soon as possible after the cessation of hostilities, though it must be dealt with subject to an important reservation. Mr. Massey, though content for the present with the expedient of an Imperial Cabinet, with the possible addition of an Imperial Council, still intimated his opinion that the full federal constitution would in course of time develop.

A second Imperial War Conference met in the summer of 1918, and, as in 1917, its meetings alternated as a rule with meetings of the Imperial War Cabinet. So far as appears from the published Minutes the constitutional problem was not even approached. Questions of naturalization, of demobilization, of inter-imperial communica-

tions, of emigration, of the treatment of British Indians in the Dominions, of the supply of raw materials, and similar topics were dealt with in detail, but as hostilities had not yet ceased the problem of constitutional relations was avoided. Properly so, under the terms of the Resolution of 1917. The Conference broke up on 26 July; the Imperial War Cabinet held its last meeting on 30 July.

So rapid was the development of events in the various theatres of war during the next three months that questions of constitutional procedure were inevitably put on one side. It was indeed officially announced on 18 August that each Dominion was to have the right to nominate a visiting or resident minister in London to be a member of the Imperial War Cabinet, but as a fact no formal nomination was ever made. Before leaving England Sir R. Borden provisionally arranged for the attendance of a Canadian representative at any meetings of the Imperial War Cabinet that might take place; General Smuts, himself a member of the British War Cabinet, was available to represent South Africa, and Mr. Hughes also remained in England during the interval between the conclusion of the plenary session of the Imperial War Cabinet and the meeting of the Peace Conference in Paris. During that interval several meetings of the Imperial War Cabinet were held;<sup>1</sup> but the conclusion of the Armistice (11 November) precipitated the summoning of the Peace Conference; the Dominion representatives were immediately recalled to England; and by the 20th of November the Imperial Cabinet, though not complete in personnel until the close of the year, was again in formal session. At least twelve meetings were held before the end of the year, two of the most interesting being held on the morning and afternoon of 3 December when the Imperial War Cabinet met M. Clemenceau and Marshal Foch, representatives of France, and Signor Orlando and Baron Sonnino, repre-

<sup>1</sup> Parliamentary Debates. Official Report. Commons, pp. 110, 593.

representatives of Italy, who had come to London for an important conference. Important meetings were also held before and after Christmas, at the time of President Wilson's visit.<sup>1</sup>

On 12 January 1919 the Peace Conference assembled in Paris and thither the centre of political gravity necessarily shifted. The Conference when in plenary session consisted of seventy delegates. This unwieldy body never met except for purely formal business<sup>2</sup> such as the signature of peace, the actual treaty being signed by sixty-eight out of seventy delegates.<sup>3</sup> The Executive Committee of the Conference was, according to the agreed plan, to consist of the 'Council of Twenty-five' on which each of the five great belligerents were to be represented by five delegates. On this the British Empire would act as a unit, and among its delegation a representative of the Dominions was to be included. Too big for executive purposes, the Council of Twenty-five narrowed itself down to a Council of Ten which was simply a reproduction or continuation of the Supreme War Council. Even this body was too large and its methods too cumbrous for the rapid decisions which the situation and an impatient world demanded, and in the middle of March 1919, by the dropping out of the two Japanese representatives, and of the Foreign Ministers of the other Great Powers, the Council of Ten became the 'Big Four': the Prime Ministers of England, France, and Italy, and the President of the United States. At meetings of the Council of Ten, as at those of the 'Big Four', representatives of the smaller Powers, of the Dominions, and of India were called in when matters specially affecting their interests were under discussion; but the British Oversea Dominions enjoyed, as compared with the smaller Powers, the further advantage that on the Council of Ten one of

The  
Peace  
Confer-  
ence at  
Paris,  
1919

<sup>1</sup> *Report*, 1918, p. 11.

<sup>2</sup> It met six times before the signature of the Treaty of Versailles, but the only meeting of importance was that at which the Covenant of the League of Nations was debated. *History of the Peace Conference in Paris*, ed. Temperley, i. 250. <sup>3</sup> Only China (two delegates) abstained.



their representatives frequently sat with Mr. Balfour as representing the British Empire, while 'during the last month of the proceedings in Paris the additional compliment was paid to the Prime Minister of Canada of appointing him Chairman of the British Empire Delegation in the absence of Mr. Lloyd George'.<sup>1</sup>

Separate  
representa-  
tion of  
the Do-  
minions

Had the Dominions been represented at Paris only in and by the British Empire Delegation, it might have made for simplicity of procedure, for the avoidance of friction at the moment, and of complications both internal and external in the future. Had that course been adopted the Peace Conference would still have formed, as General Smuts claims that it did form, 'one of the most important landmarks in the history of the Empire'; but with such a position the Dominions were not content.

'It was abundantly clear to my colleague and myself that Australia must have separate representation at the Peace Conference. Consider the vastness of the Empire and the diversity of interests represented. Look at it geographically, industrially, or how you will, and it will be seen that no one can speak for Australia but those who speak as representatives of Australia herself.'<sup>2</sup>

So spake Mr. Hughes in the Commonwealth House of Representatives. Other Dominion Premiers have spoken—since they were free to speak—to the same effect; but perhaps the Dominion's claim, and the ground of it, is most clearly expressed in a telegram from the Canadian Cabinet to Sir Robert Borden, who was at the time sitting in the Imperial War Cabinet:

'... In view of war efforts of Dominion other nations entitled to representation at Conference should recognize unique character of British Commonwealth composed of group of free nations under one sovereign and that provision should be made for special representation of those nations at

<sup>1</sup> Keith, *op. cit.*, p. 150, quoting Canada *Sess. Paper*, 1919, No. 41.

<sup>2</sup> *Commonwealth of Australia, Parliamentary Debates*, No. 87, p. 12168. The whole of Mr. Hughes's speech on the Peace Treaty will repay the most careful perusal.

Conference, even though it may be necessary that in any final decision reached they should speak with one voice.' (4 December 1918.)<sup>1</sup>

Sir Robert Borden accordingly claimed separate representation for each of the Dominions equal to that of Belgium and other small allied nations. To Canada the idea was intolerable that the United States should have five delegates and Canada none, for as General Smuts put it when speaking in the Union Parliament: 'Canada and Australia made a greater war effort than any other Powers below the rank of first class . . . Australia alone lost more than the United States of America.' To the reasonableness of the claims of the Dominions the British Government were easily persuaded; not so the allied representatives.

'They could not', as General Smuts subsequently pointed out, 'realize the new situation arising, and that the British Empire, instead of being one central Government, consisted of a league of free States, free, equal, and working together for the great ideals of human government.'<sup>2</sup>

Stated thus bluntly the situation might perhaps have created surprise if not alarm in the minds of other people besides the allied representatives. But the Dominions had their way. In the *Plenary Conference* Australia, Canada, and South Africa were each represented by two delegates, being treated as small nations on the same level as Greece, Portugal, Poland, or Roumania; New Zealand was represented by one. The Dominions in the aggregate were also entitled to be included in the British Empire Delegation of five members. Nor was the part which they played on this Delegation insignificant or subordinate. On the contrary, the leader of the British House of Commons emphatically insisted that just as in the Imperial War Cabinet the Dominion representatives 'took in every respect an equal part in all that concerned

<sup>1</sup> Quoted by Duncan Hall, *op. cit.*, p. 184.

<sup>2</sup> Duncan Hall, *op. cit.*, pp. 183-4, 185.

the conduct of the war; so in Paris, in the last few months, they have, as members of the British Empire Delegation, taken a part as great as that of any member except perhaps the Prime Minister, in moulding the Treaty of Peace'.<sup>1</sup>

Well might General Smuts acclaim the Paris Conference as one of the most important landmarks in the history of the Empire. It is indeed impossible to read the debates on the Peace Treaty in the Legislatures of Canada and Australia<sup>2</sup> respectively without becoming acutely conscious of the fact that profoundly as were the Dominions interested in the actual terms of the Treaty of Versailles, they were even more interested in the new *status* accorded to their representatives alike in the negotiations precedent to the signature of the Treaty, and in the League of Nations. That status—cordially conceded by the Imperial Government but somewhat reluctantly recognized by the Allied and Associated Powers—was succinctly and accurately defined by a speaker in the Commonwealth Parliament: 'The Empire', said Mr. Burchell, 'to-day stands in the position of a league of nations within the League of Nations.'<sup>3</sup>

Towards the assertion on the one side and the recognition on the other of the complete nationhood of the self-governing Dominions, things had, as already indicated, been tending for some time: but, as so often happens in political evolution, the final stage was reached with dramatic suddenness. The outbreak of war, as we have seen, found the Imperial Government in a position, as regards international affairs, of unquestioned autocracy; the signature of peace found the Dominions almost on a plane of equality with the mother-country *vis-à-vis* the other nations of the world. Full equality is claimed on their behalf. Thus Mr. Rowell, President of the

<sup>1</sup> Speech by Mr. Bonar Law to the Empire Parliamentary Association, 16 May 1919; quoted Duncan Hall, *op. cit.*, p. 189.

<sup>2</sup> The Debates in the Parliament of the Union of South Africa are not officially reported.

<sup>3</sup> *Commonwealth of Australia Debates*, No. 90, p. 12586.

Council of Canada, speaking in the Dominion Parliament (11 March 1920) said :

'I venture to think that the position won for Canada by her soldiers on the field of battle and maintained for her by her statesmen at the Peace Conference, recognized and made certain by the bringing into force and by the coming into operation of the Treaty of Peace and the formal inauguration of the League, means that Canada is not only an integral portion and one of the free nations of the British Empire, but has an acknowledged status among the other nations of the world. . . . The status is one of equality, we are nations within the Empire, all equal in status, though not of equal power, under a common Sovereign, and bound together by ties of interest and sentiment, by history and by all that united the different branches of the Anglo-Saxon peoples, and the other nations within the various portions of the Empire, by ties which though light as air are as strong as iron in binding together this great League of Nations which we call the British Empire, or the Britannic Commonwealth.'

Quotations of similar import might be multiplied from The Do-  
the speeches and writings of Dominion statesmen; nor minions  
can the significance of the language be mistaken. The and the  
Dominions are at all costs determined on recognition of Peace  
their equal nation-hood within the Empire. The war, Treaties  
which was expected to forge the last link in the chain of  
federalism, has resulted in the making of a Britannic  
confederation; it has issued, in technical language, in a  
*Staatenbund* and not a *Bundesstaat*; a league of nations  
within the larger league, not a 'composite unitary State'  
Sir Charles Lucas foresaw the development before the  
war, and expressed it in a sentence: 'We have created  
nations and cannot uncreate them. We can only recog-  
nize and welcome existing conditions and move forward  
again. . . . There is only one sure guide to the future and  
that is the race instinct which represents day to day  
opportunism.' It is well and truly said.  
With the terms of the settlement arrived at by the  
Paris Conference this work is not concerned, but it would

be unfair to the Dominions were the impression to be conveyed that their insistence upon separate representation, and upon the recognition of the new *status* implied in such representation, was due either to constitutional pedantry or to political contumacy. Issues vital to them were at stake, and the determination of those issues they were not prepared to entrust to any representatives, except such as were directly responsible to the Dominion Legislatures. Thus the Union of South Africa was vitally interested in the disposition of the colonies which had formerly belonged to Germany upon the African continent, and in particular in German South-West Africa. The conquest of that territory had been the work of South African forces; it was no more fitting than just that the Peace Conference should have confirmed its possession to the Union of South Africa. But it was confirmed on conditions.

Mandate  
for South-  
West  
Africa

By Articles 118 and 119 of the Treaty of Versailles, Germany renounced in favour of the Principal Allied and Associated Powers all her rights over her overseas possessions. Article XXII of the Covenant of the League of Nations laid down that 'to those colonies and territories which as a consequence of the late war have ceased to be under the Sovereignty of the States which formerly governed them, and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization'. It further suggested that the best way of giving effect to this principle is that 'the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position, can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as mandatories of the League'. The character of the mandate must, however, differ 'according to the stage of the development of the people, the geographical

situation of the territory, its economic conditions and other similar circumstances'.

South-West Africa belongs to the third category of mandates which 'can be best administered under the laws of the mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population'. The mandate was offered to and accepted by the Union of South Africa on behalf of Great Britain, in accordance with terms laid down by the Council of the League of Nations. The terms enjoin upon the mandatory the duty of promoting to the utmost 'the material and moral well-being and the social progress of the inhabitants'; they prohibit slavery, the sale of intoxicants to natives, the establishment of military or naval bases; and provide for complete freedom of conscience, and facilities for missionaries and ministers of all creeds.<sup>1</sup>

If the Union of South Africa was vitally interested in the ex-German colony adjoining it, not less were Australia and New Zealand interested in the disposition of those islands in the Pacific which since 1884 Germany had acquired. Those islands were swept up by the dominant Sea-Power in the first weeks of the Great War. German Samoa was occupied by a force from New Zealand on 29th August 1914; the Bismarck archipelago and German New Guinea fell to the Australians in September; while the Japanese took the Marshall and Caroline Islands and, with the help of British forces, Kiauchow (7 November).

To whom were these former possessions of Germany to be assigned at the Peace? On this question some difficulty arose between the Imperial authorities and the Australasian representatives. 'One of the most striking features of the Conference', said Mr. Hughes, the Premier of the Australian Commonwealth, 'was the appalling ignorance of every nation as to the affairs of every other nation, its geographical, racial, historical conditions or traditions.'<sup>2</sup>

<sup>1</sup> Cmd. 1204 (1921).

<sup>2</sup> *Commonwealth of Australia: Parliamentary Debates*, No. 87, p. 12173.

The safety of Australia, so her sons maintained, demanded that the great rampart of islands stretching around the north-east of Australia should be held by the Australian Dominion or by some Power (if there be one ?) in whom they have absolute confidence. At Paris Mr. Hughes made a great fight to obtain the direct control of them ; worsted in that by the adherence to Mr. Wilson's formula, Australia was forced to accept the principle of the mandate ; but her representatives were careful to insist that the mandate should be in a form consistent not only with their national safety but with their ' economic, industrial, and general welfare '.

✓ In plain English that meant the maintenance of a 'White Australia', and a preferential tariff. On both points Australia found herself in direct conflict with Japan, but, despite the formal protest and reservation of the latter, the mandates for the ex-German possessions in the Pacific were issued in the form desired by the British Dominions : i.e. in the same form as that accepted for South-West Africa.

The islands south of the Equator were, on these conditions, assigned to the British Empire or its Dominions : the Bismarck archipelago, German New Guinea, and those of the Solomon islands which had formerly belonged to Germany, to Australia ; German Samoa to New Zealand, and Nauru to the British Empire.

Dissatis-  
faction of  
Australia  
and New  
Zealand

✓ With these acquisitions Australia and New Zealand were not satisfied. They wanted no near neighbours in the South-Western Pacific—least of all the Japanese. The United States manifested a good deal of sympathy with the attitude of Australasia, and would have given them all the former German islands in the Pacific—under mandate. Japan, however, was not disposed to relax her hold upon those to the north of the Equator. Mr. Hughes argued that they could be of no value to Japan either for purposes of settlement or trade, but they might, on the contrary, be a serious menace to the security of Australasia, particularly as affording submarine bases. But the

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Imperial Government, bound by its agreement with Japan, felt constrained to acquiesce in her wishes, and the Marshall, Caroline, Pelew, and Ladrone Islands were accordingly assigned, under mandate, to Japan. Australia would further have been glad to see the condominium in the New Hebrides, which has worked none too well, terminated by the withdrawal of France. But, as France was unwilling, the point plainly could not be pressed. That the final result evoked some disappointment, not to say resentment, in the Australasian Dominions cannot be gainsaid; but the question naturally obtrudes itself: Could the Dominions have got better terms had they gone to Paris as independent States, instead of as units of the British Empire? 'Would their position at the Peace Conference have been so good?

The Prime Minister of the United Kingdom, speaking in the House of Commons on 18 August 1921, virtually answered this question as follows: 'The Representatives of the Dominions and of India constituted part of the British Delegation and sat in almost constant session in Paris directing the policy of the British Empire.' Thus, the Imperial War Cabinet was practically continued at Paris. Mr. Lloyd George then proceeded:

'My Right Honourable Friend, the President of the Council (Mr. Balfour), and I represented the British Empire inside the Conference, but there was no action taken by us that had not been submitted beforehand to the British Empire Delegation on which the Dominions and India were represented. We held constant Conferences or Cabinets in Paris where the whole of the Empire was represented, where representatives of all parts of the Empire took part in the discussions and where they had exactly the same voice in determining British policy as any member of the British Cabinet.'

That the Dominions gained by the status thus conferred upon them will hardly be denied by any one conversant with the facts. 'Supposing', said Mr. Lloyd George, 'they had been there as separate independent nations, holding no allegiance to the



British Crown. They would not have had one-fifth of the power and dignity they had as representatives of nations inside the British Empire. There was one man sitting on a Commission—the Prime Minister of Canada—deciding questions of the Turkish Empire. There was another sitting on a Commission deciding the fate of Poland and the Eastern frontiers of Germany. . . . If they had been independent nations they would not have sat so high in the Council Chamber. It was the fact that they were independent nations inside the British Empire which gave them all this power, and they knew it, and they are proud of it.<sup>1</sup>

Nevertheless, when all is said, Australia and New Zealand might reasonably feel—though their feelings were, on the whole, kept well under control—that despite the superb services they had, in the war, rendered to the common cause, their immediate interests were, at the Peace, sacrificed to considerations dictated by the world-policy of the British Empire. Detailed discussion of these questions is, however, beyond the scope of the present work. To return to the more limited problem of machinery.

Signifi-  
cance of  
the Peace  
Confer-  
ence

In the constitutional history of the British Empire and its component parts the Paris Conference will for ever stand out as a landmark of immense and perhaps unique significance. For the first time the British Empire was diplomatically recognized as a Power; for the first time the Dominions and India were similarly recognized as Powers.<sup>2</sup> The status of each was made clear not only by many documents and memoranda incidental to the Conference but still more by the attestations to the Treaties of Peace. Thus, the Treaty of Versailles was signed on behalf of 'His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions Beyond the Seas, Emperor of India' by five English Ministers, as well as by two representatives for the Dominion of Canada, two for the Commonwealth of Australia, two for the Union of South Africa, one for the Dominion of New Zealand, and two for India. Similarly

<sup>1</sup> *Official Report*, vol. 146, No. 123, pp. 1704-13.

<sup>2</sup> Keith, *op. cit.*, p. 153.

in the list of the High Contracting Parties the British Empire appeared *eo nomine* as one of the five Principal Allied and Associated Powers. To clinch the position the terms of the Treaties were formally approved by each of the Dominion Parliaments, though the legal ratification was the act of the Crown, and the ratifying document was deposited on behalf of the British Empire by a United Kingdom Minister, the Secretary of State for Foreign Affairs. The Dominions were, however, emphatic in asserting that in thus ratifying the Treaty on their behalf the Crown was acting on the advice not of his British Ministers, but on that of the Ministers Executive of the several Dominions.

✓ The new *status* of the Dominions also received remarkable recognition in the Covenant of the League of Nations. Under the Covenant the Dominions and India are original members of the League, and each of them has the right of separate representation in the Assembly of the League. Canada and Australia, for example, have precisely the same rights as Belgium or Spain. They have the same voting powers, including the right of voting for the elected members of the Council, and the right of becoming a candidate for one of the four elective seats. They have the same right also of direct access to the Council (should they choose to exercise it), and the right of *ad hoc* representation on the Council during the discussion of any particular question in which they may be interested. As there are many questions on which the decisions of the Council are required to be unanimous it is plain that the Dominions can veto any action inimical to their interests or opposed to their wishes.

The Dominions  
and the  
League of  
Nations

✓ How far the concession of such powers to nations which are still integral parts of the British Empire accorded with the best interests of the Dominions or of the Empire is an arguable question, though it cannot be argued here. ✓ Still less is it certain that the separate representation conceded to the British Overseas Dominions helped to commend the League to other Powers,

notably to the United States of America. But again discussion must be declined. The outstanding fact remains that in the League the Dominions are recognized as separate entities, as Nations enjoying equal status with all except the Principal Allied and Associated Powers.

The Con-  
ferences  
of 1921

During the two years after the signature of the Peace Treaties the Dominion statesmen, like those of the Homeland, were busily occupied in trying to put their own households in order. But in June 1921 they once more assembled in London. The precise status and even the official designation of that Assembly gave rise to considerable discussion not to say controversy. The Overseas Dominions were invited to take part, in accordance with resolutions previously adopted, in an Imperial 'Cabinet'. Since the previous sessions of that Cabinet some suspicion of the term would seem, however, to have been engendered in the Dominions. Were the overseas statesmen then merely to take part in a Conference of the pre-war type? After all that had happened since 1914 that was plainly unthinkable. Yet a 'Cabinet' seemed to imply responsibility for executive decision. To whom, then, were the members of the Cabinet to be responsible? The responsibility of one was to the Imperial Parliament, of another to the Canadian, of a third to the Australian Parliament, and so on. There was, therefore, it must be acknowledged, some constitutional force in the objection taken to the term 'Cabinet'. The difficulty of terminology seems to have been shelved rather than solved, and the official report was given out as 'A Summary of the Proceedings at a Conference of Prime Ministers and Representatives of the United Kingdom, the Dominions and India'. The larger constitutional question was, however, squarely faced, with the result that the following Resolution was adopted:

'The Prime Ministers of the United Kingdom and the Dominions, having carefully considered the recommendation of the Imperial War Conference of 1917 that a special Imperial Conference should be summoned as soon as possible after the

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War to consider the constitutional relations of the component parts of the Empire have reached the following conclusions:

(a) Continuous consultation, to which the Prime Ministers attach no less importance than the Imperial War Conference of 1917, can only be secured by a substantial improvement in the communications between the component parts of the Empire. Having regard to the constitutional developments since 1917, no advantage is to be gained by holding a constitutional Conference.

(b) The Prime Ministers of the United Kingdom and the Dominions and the Representatives of India should aim at meeting annually, or at such longer intervals as may prove feasible.

(c) The existing practice of direct communication between the Prime Ministers of the United Kingdom and the Dominions as well as the right of the latter to nominate Cabinet Ministers to represent them in consultation with the Prime Ministers of the United Kingdom, are maintained.<sup>1</sup>

To ardent Imperialists of the older school this Resolution caused considerable disappointment. Yet it is clear from the published utterances of the leading statesmen of the Dominions, not less than from the speech delivered by the English Prime Minister in the House of Commons on 18 August 1921, not only that the Resolution was reached with unanimity, but that its acceptance was in no degree held to have impaired the constitutional significance of the recent meeting. 'The general feeling was', said Mr. Lloyd George, 'that it would be a mistake to lay down any rules or to embark upon definitions as to what the British Empire meant. . . . You are defining life itself when you are defining the British Empire. You cannot do it, and therefore . . . we came to the conclusion that we would have no constitutional conference.' Mr. Hughes was even more explicit: 'It is now admitted that a Constitutional Conference is not necessary, and that any attempt to set out in writing what are or should be the constitutional relations between the Dominions and the Mother Country would be fraught with very great danger to the Empire'.

<sup>1</sup> Summary of Proceedings and Documents, p. 9.

The question of a Constitutional Conference or any attempt at reduction of the Constitution to writing may be therefore regarded as having been finally disposed of 'No written Constitution', said Mr. Massey, 'is required. Yet Mr. Massey made it clear, as have other Premiers that in his opinion the recent meeting was 'a long way the most important which has yet been held'. It was 'the first Conference where the representatives of the overseas Dominions had been called upon to take part in matters connected with the management of the Empire as a whole'. Nor can it be doubted, whatever technical name be given to the meeting, that it did act in effect as an Empire Cabinet. It not merely discussed but decided questions of supreme moment to the Empire and to the world, and its decisions, like those of a British Cabinet, were invariably reported immediately to the King.

Such is the point which the constitutional evolution of the British Empire had reached at the opening of the third decade of the twentieth century. Is the conclusion characteristically inconclusive? Does it represent an anti-climax? Or is it merely that the eternal paradox persists; that in the political development of the English race the kingdom will not come by observation; that he who would save his political soul must lose it; that it is only by losing it that it can be saved? These words are written at a time too near to the mighty events of the recent past to permit them to be seen in true perspective. The war whose outbreak was to be the signal for the dissolution of Britain's 'loosely compacted Empire' seemed certain, before it had proceeded many months, not merely to bind it together more closely than ever in sentiment, but to translate sentiment into concrete institutions. The Imperial War Cabinet of 1917 appeared to have brought an Imperial Constitution within the sphere of practical politics. The Conference somewhat chilled the ardour aroused by the Cabinet; yet the plea

for delay was reasonable. One does not, as Lord Rosebery has sagely remarked, rebuild a house in the midst of a hurricane. But the hurricane has subsided and the rebuilding, as designed by material architects, seems to be indefinitely postponed. Were the federalists on the wrong tack? Was Alexander Hamilton, whose work for the United States was, a few years ago, held up to us not merely for admiration but for imitation, outside the true line of philosophical succession? Is Burke the real interpreter of the political genius of his countrymen? Was he right in condemning the 'virtue of paper government', and in trusting to 'ties which though light as air, are as strong as links of iron'? Are common names, kindred blood, and equal privileges more potent than 'the forms and machinery of a constitution'? Must we abandon the Roman idea of colonial connexion and prefer that of the Greeks? Shall we be content with a *Staatenbund* in place of a *Bundesstaat*?

Questions such as these must needs occur to every student of the history of the British Empire. The time for a definite answer is not yet; it may well be that the constitutional evolution of the Commonwealth has not reached its term: *finis coronat opus*.



BOOK IV  
THE STRUCTURE OF GOVERNMENT





### XIII. THE SEPARATION OF POWERS

'All States have three elements, and the good law-giver has to regard what is expedient for each State. When they are well ordered, the State is well ordered, and as they differ from one another, Constitutions differ.'—ARISTOTLE, *Politics*, iv. 14.

'Unless there is an equitable adjustment in a State, of rights, offices, and functions, so that the Executive may have sufficient power, the Senate sufficient authority, and the people sufficient liberty, the frame of government cannot remain stable and free from violent change.'—CICERO, *De Republica*, c. xxxiii.

'The result of this power of the several estates for mutual help or harm is a union sufficiently firm for all emergencies and a constitution than which it is impossible to find a better. . . . For when any one of the three classes manifests an inclination to be unduly encroaching, the mutual interdependence of all the three and the possibility of the pretensions of any one being checked and thwarted by the others must plainly check this tendency; and so the proper equilibrium is maintained.'—POLYBIUS on the Roman Constitution, *Histories*, vi. 18.

'Si la puissance de juger était jointe à la puissance législative, le pouvoir sur la vie et la liberté des citoyens serait arbitraire.'—MONTESQUIEU, *Esprit des Loix*, xi. vi.

HAVING completed a rapid survey of some typical politics of the modern world, we now proceed to inquire what guidance is afforded by the working of those constitutions in the solution of various problems of government by which the modern State is confronted.

Constitutional problems

Problems connected with the Legislature and the Electorate demand the first consideration. What is the best form of Legislative Body: may the function of legislation be safely entrusted to a single chamber; if so, how shall that chamber be elected and composed; if not, what form shall a second chamber take? Shall membership of the second chamber be mainly or partially hereditary as in England; shall it, as in Canada, be based upon the principle of nomination; or upon direct election, as in Australia; or, as in France, upon indirect election? What are the appropriate powers and functions of the Legislature? Shall it be, as in England, legally omni-

The Legislature

potent, with power not merely to make laws but to revise the Constitution ; or shall it be confined, as in the United States, to the making of laws within the rigidly defined limits of an Instrument or Frame of Government ? If the function of the Legislature be thus limited, what provision should be made for the revision of the Constitution itself ? Is it desirable to submit constitutional amendments to the direct vote of the electorate by means of a *Referendum* ? Ought the electorate to possess the right of initiating such amendments ? Should similar powers be exercised by the electorate in regard to ordinary legislation ? Are such devices, be they intrinsically sound or unsound, consistent with the theory of Representative Democracy ? How should the electorate itself be composed ? Should representation be based upon the principle of locality or upon that of occupation ? Is a man primarily a citizen or a craftsman ? How shall effect be given, in either case, to his wishes ? How far is it proper to respect the opinions of minorities ? By what method can this best be done ? Such are some of the problems which inevitably suggest themselves in connexion with the Legislature and the electorate.

The Executive      Parallel problems must be considered in reference to the Executive authority. Shall the headship of the State be vested in an hereditary monarch or an elective President ? Shall the President be the actual repository of executive power or merely the official chief of the State ? In the former case should the Executive be responsible to the Legislature or to the electorate ? In either case what should be the relation between the Executive and the Legislature ? Should the Executive be co-ordinate in authority with the Legislature or subordinate to it ? Is the Cabinet system or the Presidential to be preferred ? Is there a third alternative ? May the actual control of administration be safely entrusted, as in Switzerland, to the Legislative Body ? Should executive authority be shared, as in the United States, with the Legislature ; or ought the functions to be kept rigidly apart ?

What is the true position of the Judicial Body? How should the judges stand as regards the Executive and the Legislature? Ought the judges, as Bacon held, to be 'lions but lions under the throne'; or is it essential to purity of administration and to the preservation of liberty that the Judiciary should be wholly independent of the Executive? Should the judges themselves be nominated or elected? Should they enjoy a permanent tenure of office or be subject to the *Recall*? What is the proper relation between the Judiciary and the Legislature? Should the judges be merely interpreters of the law, or should they be guardians of the Constitution, exercising, in effect, an appellate jurisdiction as against the makers of the laws?

The Judiciary

Another sheaf of problems is raised by a consideration of the functions appropriate to central and local government respectively. Under primitive conditions all government is local government; in the more advanced societies power tends to be concentrated in the hands of the central administration. Is this tendency sound? Does it promote efficiency and economy? If it be desirable to vest considerable power in Local Authorities, how should those authorities be constituted? Are the principles which determine the distribution of functions among the several organs of the central government equally applicable to local administration?

Central and Local Government

Questions such as these, if pushed to their logical conclusion, raise a problem even more fundamental: should the structure of the State be unitary or federal? Federalism may represent either a centripetal or a centrifugal movement; it may even represent a combination of both. The United States of America and the Commonwealth of Australia alike illustrate, in their federal constitutions, the triumph of the centripetal idea. The birth of the Federal Dominion of Canada represented, as we have seen, a separatist tendency as between Ontario and Quebec, but at the same time it brought these provinces into closer association with the Maritime

Federalism and Devolution

Provinces, it brought the Maritime Provinces into closer association with each other, and it provided a framework into which were ultimately fitted units so mutually remote as British Columbia, Alberta, and Prince Edward Island. Federalism as proposed for the British Commonwealth might similarly be found to reconcile principles which are theoretically opposed, giving to the parts an even larger autonomy than that which they at present enjoy, but simultaneously conferring upon the whole powers which are now non-existent. On the other hand, federalism may be frankly centrifugal in intention and actually in effect. The Act for the Better Government of Ireland (1920), setting up subordinate Legislatures, with Executives responsible thereto in Dublin and Belfast, was commended by its authors as federal in principle, though it was in effect admittedly centrifugal. An important question arose in connexion with that ill-fated measure: whether the residue of powers should be vested in the Imperial or in the subordinate Parliaments; or conversely, whether certain enumerated powers should be delegated to the Irish Parliaments, or whether only certain enumerated powers should be reserved to the Imperial Parliament? Subsequent events have, it is true, rendered the discussion academic, but that fact does not affect the theoretical validity of the arguments advanced. Those arguments raise issues of vital importance to every scheme of government based upon principles professedly federal. Consideration of them must, however, be deferred to a later chapter. Before the discussion of any of these problems can be approached an answer must be given to a fundamental question: In an ideal polity, should the several functions of government, legislative, executive, and judicial, be rigidly delimited, or is it to the common advantage that they should as far as possible be performed in close co-operation if not actually combined?

The  
Separa-  
tion of  
Powers

In the science of government as in the art of industry progress is commonly measured by the advance in the

principle of differentiation. Adam Smith builds his argument for an advance in the productive capacity of the nations of the world upon the principle of the 'division of labour'. In specialization and co-operation are to be found the keys to every advance in the organization of industry. Free Trade is but the application of the same principle to commercial intercourse between nation and nation. Politics approaches the same problem from a somewhat different angle. Eight and twenty years before the publication (1776) of *The Wealth of Nations* Montesquieu had given to the world his *Esprit des Lois* (1748). Montesquieu discerned in the theory of the separation of powers the most effective guarantee for the preservation of political liberty, and it was the philosophy of Montesquieu which, as we have seen, inspired the Constitution makers of the United States of America and of revolutionary France.

But the problem is much older than Montesquieu, although it was he who, among the moderns, first concentrated attention upon it.

Aristotle distinguishes three elements in a well-ordered State as follows: (i) The deliberative (τὸ βουλευόμενον περὶ τῶν κοινῶν); (ii) the magisterial (τὸ περὶ τὰς ἀρχάς); and (iii) the judicial (τὸ δικάζον). The first is concerned with all the high questions of general interest to the community: the making of war; the conclusion of peace treaties and alliances; the infliction of the death penalty; exile and confiscation; the auditing of accounts; and the passing of laws. The absence of a special legislative organ will be noted; but the Greek philosophers presupposed the existence of a code of laws framed by a νομοθέτης or lawgiver, actual or mythical—a Solon, an Hippodamus, a Phaleas of Alcaeon—and acquiring by tradition an almost Divine authority. Such laws were not to be lightly changed. Some were disposed to doubt whether they should be changed at all, 'even for the better.' Yet 'if Politics be an art change must be necessary; for as in other arts, so in making a constitution

The  
Greek  
view

it is impossible that all things should be set down in writing ; for enactments must be universal, while actions are concerned with the particular '. Aristotle infers, therefore, that ' sometimes and in certain cases laws may be changed ', though the process calls for the utmost caution. ' The habit of changing the laws is an evil, and when the advantage is small, some errors, both of lawgivers and rulers, had better be left ; the citizen will not gain so much by the change as he will lose by the habit of disobedience. . . . For the law has no power to command obedience except that of habit, which can only be given by time, so that a readiness to change from old to new laws enfeebles the power of the law.' Indispensable legislation is, however, entrusted to the deliberative assembly—in Athens the *Ecclesia*.

The organization of the magistracy ; the disposition of offices ; the mode of appointment to them ; the question of tenure ; the filling of vacancies ; the articulation of functions ; all these are matters the settlement of which demands, in Aristotle's view, the highest circumspection. The primary problem which presented itself for solution to Lord Haldane's Machinery of Government Committee was stated in their Report in the following terms : ' Upon what principle are the functions of Departments to be determined and allocated ? There appear to be only two alternatives which may be briefly described as distribution according to the persons or classes to be dealt with, and distribution according to the services to be performed.'<sup>1</sup> The question was anticipated in the *Politics* and stated by Aristotle in almost identical terms : ' Should offices be divided according to the subjects with which they deal, or according to the persons with whom they deal ? '<sup>2</sup> After all, modern England and ancient Greece are not so far apart.

On similar lines Aristotle discusses the constitution and functions of the judiciary. It should, however, be

<sup>1</sup> *Machinery of Government Committee* [Cd. 9230] Report, p. 7.

<sup>2</sup> *Politics*, iv, cc. 14, 15, 16. Cf. also ii, c. 8.

observed that while in theory a clear distinction was drawn between the deliberative and legislative, the executive and the judicial functions, in practice, as we have already indicated, the same persons exercised all three functions.<sup>1</sup>

The Roman Constitution at its best was remarkable Rome less for the differentiation than for the balanced equilibrium of powers. It is upon this feature of the Roman polity that both Polybius<sup>2</sup> and Cicero<sup>3</sup> insisted.

'As for the Roman Constitution,' wrote Polybius, 'it had three elements, each of them possessing sovereign powers; and their respective share of power in the whole State had been regulated with such scrupulous regard to equality and equilibrium, that no one could say for certain, not even a native, whether the constitution as a whole were an aristocracy, a democracy, or despotism. And no wonder: for if we confine our observation to the power of the Consuls we should be inclined to regard it as despotic; if to that of the Senate, as aristocratic; and if finally one looks at the power possessed by the people it would seem a clear case of a democracy.'<sup>4</sup>

The Consuls exercised an administrative authority which in war, if not in peace, was absolute. Yet the Senate was supreme in matters of finance, in the settlement of disputes between tributaries, as regards foreign and colonial policy, and as a tribunal in cases of high treason and other serious crimes. But the people alone could decide matters of life or death, could declare war or make peace, could ratify treaties and act as the fountain of honour and of punishment. So perfect indeed was the equilibrium between the several parts—the Consuls depending on the Senate and on the people; the Senate controlled by the people; the people dependent on the Senate and on the Consuls—that the whole moved as one articulated machine. Cicero's observations, made a century later than those of Polybius, tend to establish

<sup>1</sup> Cf. *supra*, c. iii.

<sup>2</sup> Polybius went to Rome, 167 B.C.

<sup>3</sup> In the *De Republica* (54 B.C.).

<sup>4</sup> *Histories*, vi. 11.



a similar conclusion ; the monarchical element as represented by the Consuls working in harmony with the aristocratic Senate, and both with the people.

Bodin To the subject now under revision the Middle Ages contributed nothing ; but, as already indicated in another connexion, political speculation was reawakened by the revival of learning and the Protestant Reformation. In his remarkable Treatise on the Republic—a work which is ranked by a competent critic <sup>1</sup> above the *Discourses* of Machiavelli and worthy of comparison with the work of Montesquieu—Bodin <sup>2</sup> insists that the Prince ought not to administer justice in person, but should delegate this function of government to an independent tribunal. To be at once legislator and judge is to mingle together justice and the prerogative of mercy, adherence to the law and arbitrary departure from it.<sup>3</sup>

Montesquieu It is, however, to Montesquieu we must look for the first scientific exposition, in modern times, of the doctrine of the separation of powers.

'When', he wrote, 'in the same person or in the same body of magistrates the legislative and executive power are combined, no liberty is possible, because there is reason to dread that the same King and the same Senate may make tyrannical laws with the view of executing them tyrannically. Neither is there any liberty if the judicial power be not separated from the legislative and the executive. If it were joined to the legislative power, the power of the life and liberty of the citizens would be arbitrary ; for the judge would be the law-maker. If it were joined to the executive power, the judge would have the force of an oppressor.'<sup>4</sup>

Only in England did he in his day find the separation complete, and only in England, therefore, was to be found a nation the direct aim of whose constitution is political freedom. Whether the separation of powers was so complete, even in England, as Montesquieu imagined is

<sup>1</sup> Hallam, *History of Literature*, ii. 68.

<sup>2</sup> 1530-96.

<sup>3</sup> Cf. Bluntschli, *Theory of the State* (Eng. trs., p. 486).

<sup>4</sup> *Esprit des Lois*, Bk. XI, c. vi, and cf. A. Sorel, *Montesquieu*, pp. 107, 108.

a question which must not now detain us. Blackstone, writing nearly twenty years after Montesquieu, held the same view and expressed it in words almost identical: 'In all tyrannical governments the supreme majesty, or the right both of making and enforcing laws, is vested in the same man or one and the same body of men; and when these two powers are united together there is no public liberty.'<sup>1</sup> Not less noteworthy is it that, in adapting English institutions to trans-Atlantic conditions, the framers of the American Constitution laid especial stress upon this cardinal doctrine of Montesquieu. 'The accumulation of all powers,' wrote Alexander Hamilton in *The Federalist*, 'legislative, executive, and judicial, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective may be justly pronounced the very definition of tyranny.'<sup>2</sup>

Walter Bagehot, writing a century later than Blackstone, took a view of the English Constitution directly contradictory to that of the famous jurist: 'The independence of the legislative and executive powers is the specific quality of Presidential Government just as their fusion and combination is the precise principle of Cabinet Government.'

It is, however, pertinent to observe that the Constitution of Bagehot's day was very far from being the Constitution of Blackstone's. When George III was 'really King' and before the younger Pitt had claimed the place and title which Walpole had disavowed, there was a much clearer line of distinction between Executive and Legislature even in England than Bagehot, a century afterwards, could discern. Nor is the line so precise in America as some theorists have maintained. *The Federalist* indeed insisted that 'unless these departments [legislative, executive, and judiciary] be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires as essential to a free government can never in practice be

<sup>1</sup> *Commentaries*, i. ii. 146.

<sup>2</sup> No. xlvii.

duly maintained'.<sup>1</sup> Nevertheless it is incontestable that among the characteristic features and cardinal doctrines of the American Constitution the division of powers is one of the most obtrusive.

Revolu-  
tionary  
France

The same principle permeated the first of the many constitutional experiments tried by France during the revolutionary period at the close of the eighteenth century. Partly in deference to the classical aphorism of Montesquieu, partly from a disposition to follow American as against English precedent, and not least by reason of the ineradicable suspicion at that time entertained as to the designs of the Court, the Constituent Assembly (1789) decreed an absolute separation between the Legislature and the Executive. The King was, indeed, to be allowed a veto upon legislation, but it was to be only suspensive, not absolute, and it was strictly laid down that no executive minister or holder of any office under the Crown should have a seat or a vote in the Legislature.

Regrettable as this decision was, fatal as it proved to the lingering hope that constitutional reform might, even at the eleventh hour, be effected without recourse to violent revolution, the decision was natural if not inevitable.

Of all the points of contrast between the England and the France of the eighteenth century, perhaps the most striking was the position occupied in the two countries respectively by political writers. In England the men of letters not merely mingled in affairs but not infrequently directed them. Bolingbroke and Addison were themselves Secretaries of State, and Burke was private secretary to a great Whig nobleman who was twice first Minister, while he himself sat, for years, in the House of Commons, and held, for a time, a minor office. The political philosophy of such men was necessarily tempered; Burke's was suffused by administrative experience and first-hand knowledge of practical politics. In France the divorce between thought and action was absolute. Montesquieu,

<sup>1</sup> No. xlviii.

Voltaire, Diderot, and Rousseau were men of letters without experience of affairs. Turgot was, it is true, at once philosopher and statesman, but Turgot could not hold his place against Court influence.

Similarly, the men who were returned to the States-General of 1789 were deeply influenced by the abstract theories of the philosophers but had themselves, as a rule, no experience whatever in practical administration. 'I find', wrote Arthur Young, 'a general ignorance of the principles of government, a strange and unaccountable appeal on one side to ideal and visionary rights of nature, and on the other no settled plan that shall give security to the people for being in future in a much better situation than hitherto.'<sup>1</sup> 'Among them' Burke found 'some of known rank, some of shining talents, but of any practical experience in the State not one man was to be found. The best were only men of theory.'<sup>2</sup>

In view of the recent political history of France—the centralization of administration, the virtual supersession of the local magnates and officials by the *Intendants*, the concentration of all power in the hands of the Crown and its agents—the results deplored by English observers were probably inevitable. In France the theorists pushed principles to their logical conclusion with results destructive of practical efficiency; in England efficiency was secured with happy disregard of logic, symmetry, or consistency.

The differentiation of political functions was, in England, effected in deference to the dictates of practical convenience, slowly and gradually. To-day, in all civilized States, the three functions of government are clearly distinguished, and each function is assigned to its appropriate organ: (i) the Legislature, or law-making organ, is concerned with the laying down of general rules; (ii) the Judiciary, or law-interpreting organ, with the application of general rules to particular cases; and

<sup>1</sup> *Travels in France*.

<sup>2</sup> *Reflections*.

(iii) the Executive, with the enforcing of the orders of the courts, the carrying out of the general rules embodied in statutes and with the general administration of the business of the State.

In primitive times all three functions were performed by the King. The King, though acting with the counsel and consent of the 'wise', was the supreme legislator. The results of his activities were embodied in *Dooms*, such as the *Dooms* of Ethelbert, of Ine, of Alfred, of Edward the Elder, of Edgar, and the rest. But this legislation was concerned largely with what we should now regard as Executive business—primarily with the preservation of the peace. The King, again, was the supreme Executive: the leader of the host in arms, the guardian of the 'King's Peace'. The King, finally, was the supreme judge. In theory, indeed, there has been little change in this respect between the days of Edward the Elder and those of George V. Now, as then, the King, with the counsel and consent of the wise, *makes* the laws; the King, through the mouth of his judges, *interprets* the law, and the King, with the aid of a vastly complicated administrative machine, puts the law into execution. The King has now transferred his several functions to separate bodies. This transference was, however, a slow process. The King's Court (*Curia Regis*) was, in Norman and early Angevin times, Legislature, Executive, and Judiciary in one. We should now deem it a hardship if in a dispute with a tax-collector (Executive) we could not appeal to a judicial tribunal which, though the 'King's Court', could be relied upon to decide impartially between the claims of the Crown and those of a private citizen. But in the twelfth century the functions of the judges were at least as much fiscal as judicial. The same thing is true of the King's local representative—the shire-reeve. It is no less true of the Tudor 'man-of-all-work'—the Justice of the Peace. The 'Stacks of Statutes', under which Lambarde groaned, assigned to the county magistrate functions which were

partly judicial, partly legislative, partly administrative. The Justice of the Peace had, for example, to try offenders against the law, to relieve the poor, to fix wages, and to 'set on work' the lusty unemployed. Such a confusion of functions seems to the citizen of the modern State, and more particularly to the modern Englishman, to be a serious menace to personal liberty. When judges are makers as well as interpreters of the law, the liberty of the individual is gravely imperilled; and to make members of the Executive judges in all cases which concern administrative acts seems to the Englishman hardly less destructive of liberty than to combine the functions of law-maker and judge.

The principle of the separation of powers being then generally admitted, and the differentiation of functions having been largely carried out in practice, it remains to consider, in further detail, the problems presented to the student of Political Science in connexion respectively with the Legislature, the Executive, and the Judiciary.



#### XIV. THE PROBLEM OF THE LEGISLATURE

##### (i) *Structure : Unicameralism and Bicameralism*

'A majority in a single assembly, when it has assumed a permanent character—when composed of the same persons habitually acting together, and always assured of victory in their own House—easily becomes despotic and overweening, if released from the necessity of considering whether its acts will be concurred in by another constituted authority. The same reason which induced the Romans to have two consuls, makes it desirable there should be two chambers : that neither of them may be exposed to the corrupting influence of undivided power, even for the space of a single year.'—JOHN STUART MILL.

'Il y a toujours dans un État des gens distingués par la naissance, les richesses, ou les honneurs ; mais s'ils étoient confondus parmi le peuple, et s'ils n'y avoient qu'une voix comme les autres, la liberté commune seroit leur esclavage, et ils n'auroient aucun intérêt à la défendre, parce que la plupart des résolutions seroient contre eux. La part qu'ils ont à la législation doit donc être proportionnée aux autres avantages qu'ils ont dans l'État ; ce qui arrivera s'ils forment un corps qui ait droit d'arrêter les entreprises du peuple, comme le peuple a le droit d'arrêter les leurs. Ainsi la puissance législative sera confiée et au corps des nobles et au corps qui sera choisi pour représenter le peuple, qui auront chacun leurs assemblées et leurs délibérations à part et des intérêts séparés.'—MONTESQUIEU, *Esprit des Loix*, I. xi, cvi.

'What then is expected from a well-constituted Second Chamber is not a rival infallibility, but an additional security. It is hardly too much to say that, in this view, almost any Second Chamber is better than none.'—SIR HENRY MAINE.

OF the several organs of government, the first to claim detailed analysis is that which is concerned with the making of laws. Legislation is not indeed either the primary or the primitive function of government. On the contrary the enactment of general rules belongs, as we have seen, to a relatively late stage in political development. Nevertheless, in the mechanism of the modern State the law-making body must, in logical order, take precedence of those which are concerned with the administration or the interpretation of the laws.



Problems  
of the  
Legis-  
lature

The chief problems which arise in connexion with the legislative body are, as we have seen, four<sup>N</sup>; of these the problem of structure is primary, and to a discussion of that problem the present chapter is accordingly devoted. Provisionally at least we may assume that the legislative function is entrusted to a representative body and not to the citizens as a whole. But even on this assumption the question will arise whether the functions of the elected Legislature may not properly be supplemented, or even, on occasion, be superseded, by the direct vote of the electors in a *Referendum* or *Initiative*.

Assuming, however, that the constitutional form is not direct but representative, we may proceed to ask how the legislative body may be best constructed?

Univer-  
sality of  
Bicam-  
eralism

The modern world has, with a singular measure of unanimity, decided in favour of two legislative chambers. But we must not therefore assume that the advantages of bicameralism have always been self-evident or undisputed. Most of the Constitutions now in existence are the result, as regards the structure of the Legislature, of conscious imitation of the English Parliament. Yet, as we have seen, it was some time before the form of that Parliament was defined, and the eventual adoption of the bicameral system was, in a measure, due to accidental circumstances.<sup>1</sup>

Not pre-  
valent in  
Medieval  
Europe

Nor did those circumstances prevail in other countries which like England were, during the later Middle Ages, developing a system of representative institutions. On the contrary England was, with the exception of Hungary, in this as in other respects, unique. Thus the Aragonese Cortes was organized in four arms or branches: the Clergy, the Ricos Hombres or Great Nobles, the Cabaleros or Knights, and the towns. The Swedish Diet included,

<sup>1</sup> A recent critic has maintained that the separation into two Houses is even now by no means complete. He points out with truth that Parliament still acts as one body and not as two Houses in all its solemn functions. Nor did the House of Commons have a separate journal until the year 1547. Cf. A. F. Pollard, *The Evolution of Parliament*, pp. 122 seq.

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in addition to the nobles, the clergy, and the towns, 250 representatives of the peasants. The Castilian Cortes, the States-General of France, and the Scottish Parliament were each organized in three Estates; the German Diet in three Colleges: the Electors, Princes, and Cities. It is therefore evident that if we may still be permitted to regard Parliament as an 'Assembly of Estates', the three-chamber-formation was the natural one; and the general though tardy adoption of bicameralism must be regarded as a happy accident.

Nor, perhaps, would the preference for the bicameral form have become so marked but for the exposure, by practical experience, of the inconveniences and dangers attendant upon alternative methods. In countries which have adopted the federal system, such as Canada, Germany, and Switzerland, many if not most of the State legislatures consist of a single chamber, though in each case the central or federal legislature is bicameral. Some of the smaller European States, such as Greece, have made trial of the one-chamber system only to abandon it in favour of two. The position of Norway, which perhaps may be regarded as ambiguous, will receive detailed consideration in the next chapter.

The triple or quadruple organization of *Estates* accorded with the medieval conception of society, but has in no single case survived into the modern era. Yet it survived long enough to demonstrate its impotence as a check upon autocracy. If the bicameral Parliament of England outlived a Cortes or a States-General, it was, as we have seen, mainly due to the fact that, thanks in particular to the link supplied by the knights of the shire, the two Houses of Parliament offered a solid opposition to the Crown; while in countries where the system of Estates prevailed the Crown was able, by separate negotiation with each Estate, to divide its rivals and consequently to crush them in detail. Should the *Soviet* principle supersede the parliamentary; should the system of representation by localities give place to one based upon vocations or

Alternative  
Forms

The Sys-  
tem of  
Estates

economic interests, a problem analogous to, though not parallel with, that presented to medieval Europe may conceivably emerge once more; but assuming the survival of parliamentary democracy, and of a system of representation, based primarily, if not exclusively, upon localities, the modern world will have to choose in designing the structure of the Legislature, between unicameralism and bicameralism.

Uni-  
cameral  
Experi-  
ments

From the days of the Puritan Revolution down to our own, the unicameral principle has not lacked advocates. Yet, except at moments of revolutionary fervour, the principle has never been adopted by any of the great States of the modern world. None the less are the revolutionary experiments instructive.

The  
Common-  
wealth  
and the  
Protecto-  
rate

No sooner had the Rump of the Long Parliament got rid of the Monarchy than the House of Commons abolished the Second Chamber. By an 'Act' passed on 19 March 1649 it decreed as follows:

'The Commons of England assembled in Parliament, finding by too long experience that the House of Lords is useless and dangerous to the people of England to be continued, have though fit to ordain and enact . . . that from henceforth the House of Lords in Parliament shall be, and hereby is, wholly abolished and taken away; and that the Lords shall not from henceforth meet or sit in the said House, called the Lords House, or in any other place whatsoever as a House of Lords; nor shall sit, vote, advise, adjudge, or determine of any matter or thing whatsoever, as a House of Lords in Parliament.'

Further: provision was in the same 'Act' made that 'such Lords as have demeaned themselves with honour, courage, and fidelity to the Commonwealth' should be capable of election to the unicameral Legislature. It is important to note that the 'Act' of 19 March 1649, having neither the sanction of the Crown nor of the House of Lords, had no more legal force than any other resolution of the House of Commons; as the work of a House of Commons from which the majority was

excluded by force of arms, it had even less than the usual moral significance.

The Rump of the Long Parliament having thus rid itself of the King and of the Second Chamber, proceeded to render itself independent of the electorate and to perpetuate its own power; to make itself, in a word, both legally and politically sovereign. On 4 January 1649 it had resolved that 'the Commons of England in Parliament assembled, being chosen by and representing the people, have the supreme power in this nation'. Never, as Professor Firth says, was the House

'less representative than at the moment when it passed this vote. By the expulsion of royalists and members during the war, and of Presbyterians in 1645, it had been, as Cromwell said, "winnowed and sifted and brought to a handful." When the Long Parliament met in November 1640, it consisted of about 490 members; in January 1649, those sitting or at liberty to sit were not more than ninety. Whole districts were unrepresented. . . . At no time between 1649 and 1653 was the Long Parliament entitled to say that it represented the people.'<sup>1</sup>

Nevertheless, the position it assumed had in it this element of strength: in the absence of a King, a House of Lords, and a written Constitution, there was absolutely no legal check upon its unlimited and irresponsible authority.

'This', said Cromwell, addressing his second Parliament, 'was the case of the people of England at that time, the Parliament assuming to itself the authority of the three Estates that were before. It had so assumed that authority that if any man had come and said, "What rules do you judge by?" it would have answered, "Why, we have none. We are supreme in legislature and judicature."'

Supreme the Rump claimed to be; but it ignored the dominant factor in the situation—the new model army and its general; and it chose to forget that its usurped authority rested in fact upon the power of the sword. It was before long uncomfortably reminded of this fact.

<sup>1</sup> *Cromwell*, p. 235.

By 1651 there was a clamorous demand for a settlement of the kingdom. The enemies of the Commonwealth were now scattered: Cromwell had subjugated Ireland and Scotland; the fleet, organized by Vane and commanded by Blake, had swept Prince Rupert and the Royalists from the seas; while Cromwell himself had finally crushed their hopes at home by the 'crowning mercy' of Worcester (3 September 1651). The victorious party had now leisure and opportunity to quarrel among themselves. Petitions poured in from the army praying for reforms—long delayed—in law and justice; for the establishment of a 'gospel ministry'; above all, for a speedy dissolution of the existing Parliament. The officers were ready to employ force to effect the last object; but Cromwell was opposed to it and restrained his colleagues. At last, however, even Cromwell's patience was exhausted, and on 20 April 1653 the Rump was expelled. 'So far as I could discern when they were dissolved, there was not so much as the barking of a dog or any general and visible repining at it.' So spake Cromwell, and in his estimate of the position and policy of the unicameral Rump he was undeniably right. It was in plain truth the 'horriddest arbitrariness that ever existed on earth'. The Rump conceived itself to have become a sort of residuary legatee of all the powers previously possessed by either House. 'Whatsoever authority was in the Houses of Lords and Commons the same is united in this Parliament.' Such was the theory held by Lord Chief Justice Glyn. In particular the judicial power of the House of Lords was held to be vested in the Rump, while Major-General Goffe went so far as to assure his fellow members 'that the ecclesiastical jurisdiction by which the Bishops once punished blasphemy had since the abolition of the bishops devolved also upon the House'.<sup>1</sup> The union of executive, legislative, and judicial authority more than justified Cromwell's famous description. No man's person or property was safe. It was a repetition of all the arbitrary

<sup>1</sup> Firth, *Last Years of the Protectorate*, i. 9.

tribunals 'of the régime of *Thorough* rolled into one. Hence 'the liberties and interests and lives of people not judged by any certain known Laws and Power, but by an arbitrary Power . . . by an arbitrary Power I say: to make men's estates liable to confiscation, and their persons to imprisonment—sometimes by laws made after the fact committed; often by the Parliament's assuming to itself to give judgement both in capital and criminal things, which in former times was not known to exercise such a judicature'.<sup>1</sup>

That Cromwell did not overstate the case against the arbitrary behaviour of a House of Commons, acting without a sense of immediate responsibility to the nation, and unchecked by any external authority, is no longer questioned by any competent historian. But the story is not yet complete.

To the 'Rump' there succeeded the Puritan Convention, popularly known as the 'Barebones' Parliament. This device did not work, and in December 1653 a Committee of Officers, assisted by a few civilians, produced the exceedingly interesting draft constitution embodied in *The Instrument of Government*. This document embodied that the legislative power should be vested in 'one person and the people represented in parliament', i.e. in a single chamber. The 'single chamber' when once elected showed no disposition, however, to accept the 'fundamentals' of the *Instrument*. Despite the angry admonitions of the Protector it insisted upon questioning the 'authority by which it sat'; regarding itself, in fine, as not merely a legislative but a constituent assembly. As a result the Protector dismissed it at the first legal opportunity (1655). For the next eighteen months England was delivered over to the entirely arbitrary rule of the major-generals. But early in the year 1657 a demand arose from many quarters for a revision of the Constitution. Alderman Sir Christopher Pack, one of the members for the City of London, was put up to propose

<sup>1</sup> *Cromwell*: Speech iii, Carlyle's edition, vol. iv, p. 50.

*The  
Humble  
Petition  
and  
Advice*

revision—a Second Chamber and increased power for the Protector, who was to be ‘something like a king’. By the end of March the demand took practical shape in the *Humble Petition and Advice*. The Protector was to be transformed into a king, with the right to nominate a successor; Parliament was once more to be bicameral; the ‘other House’ was to consist of not more than seventy and not less than forty members, nominated for life by ‘his Highness’, and approved by ‘this’ House.

Cromwell was well pleased with the scheme, and, had his officers permitted, would have accepted it in its entirety. But on one point the leading officers and the ‘honest republicans’ were alike immovable: they would have no king. The extremists prevailed, and Cromwell refused the offer of the crown.

*Revived  
Second  
Chamber*

The proposal for a revived Second Chamber was, on the other hand, carried with an unexpected degree of unanimity. The Protector pressed it strongly upon the officers.

‘I tell you’, he said, ‘that unless you have some such thing as a balance we cannot be safe. Either you will encroach upon our civil liberties by excluding such as are elected to serve in Parliament—next time for aught I know you may exclude four hundred—or they will encroach upon our religious liberty. By the proceedings of this Parliament you see they stand in need of a check or balancing power, for the case of James Naylor might happen to be your case. By the same law and reason they punished Naylor they might punish an Independent or Anabaptist. By their judicial power they fall upon life and member, and doth the Instrument enable me to control it? This Instrument of Government will not do your work.’<sup>1</sup>

The case against a unicameral legislature was never put with more telling effect. ‘By the proceedings of this Parliament you see they stand in need of a check or balancing power.’ The appeal to recent experience was irresistible. More horrid arbitrariness had never been

<sup>1</sup> *Ap. Firth, op. cit.* i. 137-8; i. 141.

displayed by any government. The lawyers were especially emphatic in their demand for some bulwark against the caprice and tyranny of a single elected chamber.

'The other House', said Thurloe, 'is to be called by writ, in the nature of the Lords' House; but is not to consist of the old Lords, but of such as have never been against the Parliament, but are to be men fearing God and of good conversation, and such as his Highness shall be fully satisfied in, both as to their interest, affection and integrity to the good cause. And we judge here that this House thus constituted will be a great security and bulwark to the honest interest, and to the good people that have been engaged therein; and will not be so uncertain as the House of Commons which depends upon the election of the people. Those that sit in the other House are to be for life, and as any die his place is to be filled up with the consent of the House itself, and not otherwise; so that if that House be but made good at first, it is likely to continue so for ever, as far as man can provide.'

The preference of the lawyers for a bicameral legislature was, however, only natural. They frankly favoured a return as speedy as possible to the old order, if not to the old dynasty. More remarkable is the acquiescence of the soldiers. But they too had come to realize both the inconvenience—to use no harsher term—caused by the sovereignty of a single chamber, and the insufficiency of paper restrictions imposed by the *Instrument of Government*. A freely elected House of Commons meant the restoration of the 'King of the Scots'. 'On reflection, therefore, they were not sorry', as Professor Firth pertinently remarks, 'to see a sort of Senate established as a check to the popularly elected Lower House, thinking that it would serve to maintain the principles for which they had fought against the reactionary tendencies of the nation in general. They were so much convinced of this that in 1659 the necessity of "a select Senate" became one of the chief planks in the political platform of the army.'<sup>1</sup>

<sup>1</sup> *Op. cit.* i. 142, 3.



According to the terms of the *Petition* the 'other House' was to consist of such persons 'as shall be nominated by your Highness and approved by this House'. But after much debate the approval of 'this House' was waived and the Protector was authorized to summon whom he would. The task of selection was no easy one, but Cromwell took enormous pains to perform it faithfully. 'The difficulty proves great', wrote Thurloe, 'between those who are fit, and not willing to serve, and those who are willing and expect it, and are not fit.' At last sixty-three names were selected and writs were issued, according to the ancient form, bidding them, 'all excuses being set aside,' to be 'personally present at Westminster . . . there to treat confer and give your advice with us, and with the great men and nobles'. Of the sixty-three summoned, only forty-two responded; and the second attempt to reconstruct the Constitution ended like the first in failure and confusion. No sooner did the reconstructed legislature assemble than it again began to assert its right to question 'fundamentals', and to debate the powers, position, and title to be assigned to the 'other' House. A week of this 'foolery' sufficed to exhaust the Protector's patience, and on 4 February he dissolved Parliament with some passion: 'Let God be judge between you and me.'

That was the end of constitutional experiments so far as Oliver Cromwell was concerned. After the death of the great Protector, the sword and the robe at once came into sharp and open conflict. Richard Cromwell, powerless either to control or to reconcile, was contemptuously pushed aside, and after a short period of confusion the people got the opportunity of giving free expression to their true political sentiments. It is not without significance that the Convention Parliament, with its first breath voted 'The Government is and ought to be, by King, Lords, and Commons'. From that day to this the truth of that proposition, in substance if not in terms, has not in this country been seriously disputed. The

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experiment of a unicameral Parliament claiming, though not exercising, sovereignty, had been tried and in 1660 it stood confessed, a hopeless and irremediable failure. The French experiments are not less conclusive, if not

The French Revolution

The *Comité de Constitution*, appointed on 14 July 1789 to draft a new Constitution for France, reported strongly in favour of a bicameral legislature on the English model. Mounier, the Chairman of the Committee, cordially supported its recommendation, but the Constituent Assembly would have none of it. Deeply imbued with the doctrinaire and unhistorical philosophy of Rousseau, unconvinced even by the recent example afforded by America, and beguiled by the eloquence of Mirabeau, who for once was on the side of the doctrinaires, the Assembly decided by the overwhelming majority of 849 to 89 in favour of a single Chamber. The unicameral legislature, thus conceived, and consisting of 745 elected members, lived only long enough to suspend the monarchy and to convoke a national Convention. The *Convention* met on 21 September 1792, and, having formally proclaimed a Republic, was presently delivered of the stillborn Constitution of 1793. This Constitution confided the legislative function to a single Chamber, to be annually elected by universal suffrage. One check was, however, imposed upon the power of the Legislature. A right of protest against any proposed law was reserved to the people. If such a protest were raised, the proposed law was to be submitted by Referendum to the primary electoral assemblies.

These provisions never became operative, and before it dispersed the *Convention* had so far regained its sanity as to decree the *Constitution du 5 fructidor de l'an III*, better known as the Directorial Constitution. The new Instrument provided for a Legislature of two Houses: the *Conseil des Cinq-Cents* and the *Conseil des Anciens*. Both Councils were elected by a process of double or indirect election and one third of each was annually

Constitution of the Year III

renewed. The *Cinq-Cents* alone had the right to initiate legislation, to the *Anciens* belonged only a right of veto. Constitutional amendments were excluded from the competence of the Legislature; they had to be promulgated by a special constituent assembly (*Assemblée de revision*) expressly summoned for the purpose, and to be subsequently approved by the primary assemblies.

Thus, within five years of its initiation the single-chamber experiment, beloved of the doctrinaires, and commended by Sieyès, had been discredited and abandoned, and France, gradually restored to normal health after the wild orgies of the Revolution, declined to be impaled on either horn of the dilemma, propounded by the most famous of her constitutional architects. 'If', said the Abbé Sieyès, 'a second Chamber dissents from the first, it is mischievous; if it agrees with it, it is superfluous.' Notwithstanding this logical dilemma the French people, in all the many and varied experiments which were tried between 1795 and 1848, refused to be beguiled again into the path of unicameralism; the Directory, the Consulate, the Empire, the Legitimists, and the Orleanists, all adopted for their legislature the two-chamber system.

The  
Republic  
of 1848

The short-lived Republic of 1848 reverted to the model of 1789. Under the Constitution of 1848 the legislature was to consist of a single Chamber containing 750 paid members elected by the Departments and the Colonies by universal direct suffrage, and to be subject to dissolution every three years. The initiation of laws was, however, shared between the Chamber and the President, who was further endowed with a suspensive veto. A special machinery was also provided for the revision of the Constitution, but as the Constitution itself was overthrown by the *coup d'état* of 2 December 1851 the details need not detain us. Under the new Constitution promulgated by Louis Napoleon in January 1852, the Legislative power was confided to the President of the Republic and a bicameral Parliament. Nor has France either

under the second Empire, or under the third Republic, ever been deflected from this model.

So much for the teachings of recent historical experience. Nor has Political Theory failed to enforce them. Political Theory  
Mill, Bagehot, Henry Sidgwick, Lecky, and Lord Acton, widely as they differed in their general political outlook, all concurred in the conclusion that a single Chamber Legislature is dangerous to liberty, and does not conduce to efficiency of government.

'A majority in a single assembly,' wrote John Stuart Mill, 'when it has assumed a permanent character—when composed of the same persons habitually acting together, and always assured of victory in their own House—easily becomes despotic and overweening, if released from the necessity of considering whether its acts will be concurred in by another constituted authority. The same reason which induced the Romans to have two consuls make it desirable there should be two Chambers; that neither of them may be exposed to the corrupting influence of undivided power, even for the space of a single year.'<sup>1</sup>

Walter Bagehot, *more suo*, is even more frankly utilitarian in his argument than Mill. He admits that if we had an ideal House of Commons 'perfectly representing the Nation, always moderate, never passionate, abounding in men of leisure, never omitting the slow and steady forms necessary for good consideration, it is certain that we should not need a higher chamber. The work would be done so well that we should not want any one to look over or revise it.' But he insists that the House of Commons being what it is, it is exceedingly desirable to have a revising body of some sort. We do not, as Sir Henry Maine has pointed out, 'look to a second Chamber for a rival infallibility, but for an additional security. 'It is', he says, 'hardly too much to say that in this view almost any second Chamber is better than none.' Lecky and Lord Acton, approaching the study of Politics from very different angles, are alike in their solicitude

<sup>1</sup> *Representative Government*, c. 13.

for the maintenance of freedom, and both discern in a second Chamber one of the strongest securities for its preservation.

'Of all the forms of government that are possible among mankind, I do not', writes Lecky, 'know any which is likely to be worse than the government of a single omnipotent democratic Chamber. . . . The tyranny of majorities is, of all forms of tyranny, that which in the conditions of modern life is most to be feared and against which it should be the chief object of a wise statesman to provide.'<sup>1</sup>

Lord Acton goes so far as to declare that in every genuine democracy a second Chamber is 'the essential security for freedom'.<sup>2</sup> Henry Sidgwick, fearful as were many men of his generation lest the Legislature should encroach on the functions of the Executive, held that the danger was sensibly diminished by the existence of two legislative Chambers.<sup>3</sup>

Func-  
tions of a  
Second  
Chamber

It may be taken, then, as generally agreed by theorists, that the principle of bicameralism is essential to that balance of power in the polity which cannot be impaired save with evident danger to the efficiency of the governmental machine, if not to the maintenance of the Commonwealth. (If majorities must rule, minorities need protection, and for the protection of minorities there is no more convenient guarantee than a strong Second Chamber. Moreover, the mere efficiency of legislation demands, at the lowest, a revising Committee, if not a second legislative Chamber endowed with co-ordinate authority.)

The principle that the Lower House should have superior if not exclusive power over finance is now generally accepted. The right to initiate Money Bills is usually confined to the Lower House, and in some States even the right of amendment is denied to the Upper House, though few Senates are in respect of financial control so completely impotent as the House of Lords. Even the Senate of the Commonwealth of Aus-

<sup>1</sup> *Democracy and Liberty*, vol. i, pp. 299 and 312.

<sup>2</sup> *History of Freedom*, p. 98.

<sup>3</sup> *Elements of Politics*, c. xxiii.

tralia can reject a Money Bill, and is in practice permitted to suggest amendments to the House of Representatives. In the United States the Senate may and habitually does amend Money Bills, even to the extent of increasing the charge upon the people, and indeed is virtually co-ordinate in authority with the Lower House.

French practice in regard to this important matter is more dubious. The financial powers of the Senate are legally defined by Article 8 of the Constitutional Law of the 24th February 1875 which states: 'The Senate has equally with the Chamber of Deputies the right of proposing and making laws. But financial measures must, in the first instance, be submitted to and voted by the Chamber of Deputies.' The interpretation of this Article gave rise, from the first, to acute conflicts between the two Houses, and even now there is not complete unanimity among French publicists either as to the constitutional theory, or even the conventional practice.<sup>1</sup> The Senate has, however, claimed, and constantly exercises, very wide powers in regard to the amendment of Money Bills, and even the right to restore appropriations proposed in a Finance Bill by the Ministry but rejected by the Chamber. But the rights of the Senate, in this latter respect, have never been precisely determined. As a rule the disagreements have been ultimately adjusted by a compromise. In the last resort the Senate has generally given way, though without prejudice to its constitutional powers. Thus, the question in practice has been settled by 'the system of the last word' which admittedly, in matters of finance, rests with the Chamber of Deputies. The French Senate possesses other rights of great constitutional importance. These will be examined later on. Meanwhile, it is pertinent to observe that in France, as elsewhere, the Senate is regarded as the appropriate arena for the discussion of those larger questions of policy

<sup>1</sup> Cf. Reports from His Majesty's Representatives abroad respecting the Second Chamber in Foreign States (Cd. 3824), 1907. I have also made use of a memorandum submitted to the Second Chamber Conference (Bryce Committee) by certain French publicists in 1917.

and administration for which an overburdened Lower House has little leisure. In this respect the House of Lords is certainly not inferior to any legislative Chamber in the world. But it no longer possesses, except in very limited degree, the power, by the exercise of a constitutional right, to suspend legislation, until by one means or another it has been ascertained beyond dispute that such legislation has the approval of the ultimate political authority in the State. The French Senate enjoys in conjunction with the President the very important power of dissolving the Chamber of Deputies before the expiry of its legal term. This gives to it, if not the power of making or unmaking ministries, at least a measure of control over the Executive which is inevitably denied to a Second Chamber constituted as the House of Lords is constituted to-day.

The Referendal Function

✓ Yet, unless the Lower Chamber is to be virtually omnipotent, and liable, therefore, to contract the disease of 'horrid arbitrariness' so acutely diagnosed by Cromwell, it would seem essential that there should exist in the Constitution a power of reference from the legal to the political sovereign. Such a power was at least latent in the English Constitution until 1911. The late Lord Salisbury was, indeed, wont to contend that the referendal function was the primary *raison d'être* of the House of Lords. Its duty, in his view, was 'frankly to acknowledge that the nation is our master, though the House of Commons is not, and to yield our opinion only when the judgement of the nation has been challenged at the polls and decidedly expressed'. He urged that the House of Lords was bound to use its constitutional powers to ascertain beyond a doubt 'whether the House of Commons does or does not represent the full, the deliberate, the sustained convictions of the body of the nation'.<sup>1</sup>

If, however, it is important that there should be in every Constitution some machinery, be it legal or con-

<sup>1</sup> Lady Gwendolen Cecil, *Life of Robert, Marquis of Salisbury*, vol. ii, pp. 26, 24-5.

ventional which shall assure to the political sovereign an effective measure of control over the policy of its trustees, it is assuredly not least important in States which are democratic in spirit if not in form. In a written Constitution there can be no ambiguity on this point. In a Constitution mainly unwritten and pre-eminently flexible, the safeguards against the arbitrary action of the Executive or the Legislature must needs be less defined; but they ought not to be on that account less real and effective.

That the will of the electorate, constitutionally expressed, must in the last resort prevail over all rivals is an accepted maxim of parliamentary democracy. But the last resort may be a comparatively distant one, and the action issuing therefrom is far from automatic. Some intermediate machinery would seem, therefore, to be indispensable. The House of Lords in some sort supplied it before 1911, but the cardinal defect of that House, in its referendal capacity, was that its operation was satisfactory only to one party in the State. It was objected, not without reason, that when the Conservative Party was in power the referendal function lay dormant. The soft impeachment could not be denied. Hence the violent reaction resulting in 1911 in the adoption of an expedient, professedly provisional, which has given to a Legislature, nominally bicameral, a definitely unicameral bias. That bias, by general admission, now requires correction.

Whether foreign examples can afford any help towards the solution of a constitutional problem, as obstinate as it is grave, is a question which demands closer examination. The next chapter will afford it.





## XV. THE PROBLEM OF THE LEGISLATURE

### (ii) *Senates and Second Chambers*

'I tell you that unless you have some such thing as a balance you cannot be safe. . . . By the proceedings of this [single-chamber] Parliament, you see they stand in need of a check or balancing power.'—OLIVER CROMWELL.

'The reconstitution of our Upper House of Parliament is at once the most urgent, the most difficult, and in its consequences the most far-reaching of all the reforms of our time. . . . A real and strong Second Chamber is a *sine qua non* of efficient legislation and government.' FREDERIC HARRISON (1910).

'Every Second Chamber . . . exists to . . . ensure that great changes shall not be made in fundamental institutions except by the deliberate will of the nation.'—VISCOUNT MILNER (1907).

'There is good ground for the establishment of a Second Chamber. . . . By far the best way of forming a Second Chamber in this country would be the Norwegian system.'—SIDNEY WEBB (1917).

'THERE are', said Lord Rosebery on a famous occasion, 'two exceptions to the general protest of all civilized communities against being governed by a single Chamber. I will name them. They are Greece and Costa Rica.' Lord Rosebery's list was not exhaustive when he spoke, and Greece has since re-established 'as a substitute for a Second Chamber' a Council of State, and may be deemed therefore to adhere to the bicameral principle. In addition to Costa Rica there are still four Latin-American States—Panama, San Domingo, Salvador, and Honduras—without a Second Chamber; and in Europe, Bulgaria and Jugo-Slavia and some of the new Republics which arose upon the ruins of the Empires which fell during the Great War are still unicameral. But to none of these has the civilized world yet learned to look as models of constitutional propriety, or examples of settled government.

Unicame-  
ral excep-  
tions

Norway, as already observed, is in respect of its legislative structure in an ambiguous position. Jurists are

Norway

not agreed whether it is to be classed among unicameral or bicameral constitutions. Perhaps it is for that reason that an influential section of political opinion in England looks to Norway to afford a model for the reconstruction of the Second Chamber in this country.<sup>1</sup> Be that as it may, the Norwegian system deserves analysis. Entire legislative power is vested in a body of 123 Representatives elected triennially to form the Storting. As soon as a newly elected Storting meets it proceeds to elect one-fourth of its members who constitute a revising committee known as the Lagthing, the remaining three-quarters constituting the Odelsting. The Lagthing has no power of initiating legislation, but is entitled to suggest amendments in Bills sent up to it by the Odelsting. If the latter refuses to accept them, and the Lagthing persists in its objections, a joint session is held and a two-thirds majority of the whole Storting is then required to enable the Bill to become law. The Lagthing constitutes, in conjunction with the Supreme Court of Justice, the Rigsret, the tribunal before which members of the Government can be impeached. All Bills involving questions of finance, concessions for works of public utility, the naturalization of foreigners, and motions criticizing the action of the Executive are, by rule, brought before the whole Storting, and are decided by a bare majority of votes. That the Lagthing fulfils some of the functions appropriate to a Second Chamber is evident; but, on the other hand, the members of it possess no differentiating qualifications; they are merely selected from among, and by, the members of the Storting, and do not sit by virtue of any independent right conferred either by the electorate, or by official nomination, or by hereditary privilege. Norway, then, must still languish in the shade of ambiguity.<sup>2</sup>

State  
Legisla-  
tures in  
Federal  
Common-  
wealths

The legislatures of the component States, Cantons, or

<sup>1</sup> Cf. dictum of Mr. Sidney Webb prefixed to this chapter. A similar view found at least one representative on the Bryce Committee of 1917.

<sup>2</sup> Cd. 3824, pp. 39, 40.

Provinces of Federal Commonwealths are in a class apart, and demand separate consideration. Here a Second Chamber is the exception rather than the rule. Of the eight Provinces of British North America two only (Quebec and Nova Scotia) have two-chambered legislatures. In the Helvetic Republic sixteen Cantons have a single Chamber, while two Cantons and four half-Cantons still possess the old folk-moots or direct assemblies of all the citizens. Of the German Reich more than half the component States have unicameral legislatures; in Australia all the State legislatures, except that of Queensland, retain the two-chamber form which they had adopted before the establishment of the Commonwealth; and the same is true of the component States of the United States of America.

In face of these facts it seems reasonable to conclude that, be the motives what they may, whether from force of tradition or simply on considerations of political expediency, the modern world has deliberately decided in favour of a bicameral legislature. Hardly less significant, however, is the fact that among the Second Chambers of modern States the English House of Lords remains virtually unique.

Not that there is in that fact anything remarkable. If the House of Lords is unique, so is the Constitution of which it forms part. There are, as we have seen, few modern Constitutions which are so predominantly unwritten; there is none which is so completely flexible. The position of the Second Chamber in England cannot be profitably discussed without a clear and continuous appreciation of this truth. If there be any Constitution in the world which would, on the face of it, seem to demand every imaginable protective device, safeguard, and precaution, it is our own. Yet there is none where they are, on paper, so conspicuous by their absence. Unprotected by a Constitutional Instrument; its law-making confided to a Legislature, legally omnipotent; its Executive dependent upon, and responsible to, that

A unique  
Second  
Chamber  
in a  
unique  
Constitu-  
tion

Legislature; its Judiciary independent as regards the interpretation of laws, but ultimately subject to the will and even the caprice of the Legislature; England and indeed the British Empire would seem to be peculiarly defenceless alike against the frontal attacks of those who are avowed enemies to the existing order, and against the subtle and insinuating operations of those who work under the cover of darkness, and under the forms of a Constitution which they are anxious to undermine. That the English Polity is more stable and more secure than appearances might suggest, is due to a combination of circumstances which are at once too subtle for rapid analysis and too familiar to demand it.

The  
House of  
Lords

In such a Constitution there would seem to be exceptional need for a strong and effective Second Chamber. Yet the House of Lords is, in law and by convention, exceptionally weak; with the exception of the Upper Chamber of the Kingdom of the Netherlands, perhaps the weakest in the world. Nor is its political impotence due exclusively or mainly to the passing of the Parliament Act. Long before 1911 two tendencies were operating to its enfeeblement: on the one hand the House of Lords was rapidly increasing in membership, and on the other it was becoming more and more predominantly hereditary in composition. Both tendencies were, however, in an historic view, relatively recent. Down to the sixteenth century the House of Lords was comparable in size to most of the modern Senates or Second Chambers. At the accession of the Tudors it contained about 75 members, or considerably fewer than that of the American Senate and not greatly in excess of the German Reichsrat. Moreover, of the 75 at least 45 were Bishops or Abbots and therefore non-hereditary. The abbots disappeared after the dissolution of the monasteries and the Spiritual Peers dwindled to 26. At this figure they have remained constant for three and a half centuries except for the brief period (1801-69) when four Irish Bishops reinforced their English brethren. Meanwhile the numbers of the

lay Peers increased very rapidly. Under Charles II they numbered 120; and (including 16 Representative Peers of Scotland, admitted under the Act of Union) nearly 200 under George II. George III during a reign of sixty years added 116 members to the hereditary peerage of the United Kingdom; Queen Victoria in sixty-four years added about 300. By 1925 the Temporal Peers entitled to sit in the House of Lords numbered no fewer than 670 exclusive of minors. In addition to these there are 28 Representative Peers of Ireland, 16 Representative Peers of Scotland and 5 'Law Lords' enjoying a seat in the Upper House for life.

Thus the House of Lords has become not only predominantly hereditary in composition, but utterly unwieldy in bulk. No other Upper Chamber even approximates to it. The Prussian Herrenhaus contained about 370 members; the Spanish Senate 360; the Italian 328; the French 314. But the American Senate has only 96; the Canadian 87; the German Reichsrat 66; the Swiss Ständerat 44; the South African 40; and the Australian 36.

Some  
foreign  
compari-  
sons

Nor is one of these Chambers exclusively or, with one exception, predominantly hereditary in composition. In this, as in other respects, the Upper House which most nearly resembled our own was the former Hungarian Table of Magnates with 227 hereditary peers out of a total of about 350 members. In the Prussian Herrenhaus there were no fewer than 177 official and ecclesiastical representatives as against 115 hereditary, and 73 nominated life members.<sup>1</sup> The Hungarian Upper House was the only one of any importance whose numbers ever exceeded those of the House of Lords. At one time consisting of some 800 members, it was before the war reduced by more than a half.

That modern Republics like France and the United States, and new countries like Canada, Australia, and

<sup>1</sup> The Prussian Constitution of 1920 provides for a Staatsrat to be elected by the Provincial Assemblies.

South Africa should have to rely upon the nominative or elective principle or a combination of the two, is intelligible. But why was the hereditary principle so largely discarded in the historic monarchies? Sir Henry Maine suggests a curious and interesting reason:

'There is (he writes) much reason to believe that the British House of Lords would have been exclusively or much more extensively copied in the Constitutions of the Continent but for one remarkable difficulty. This is not in the least any dislike or distrust of the hereditary principle, but the extreme numerousness of the nobility in most continental societies, and the consequent difficulty of selecting a portion of them to be exclusively privileged.'

The Abbé Sieyès insisted that the fatal obstacle to the engrafting of a House of Lords on to the Constitution 'made' for France in 1791 was the 'number and theoretical equality of the nobles'. Sieyès calculated that at the time of the Revolution France contained 110,000 noblemen, and Brittany alone 10,000. In England there has never existed a noble caste. All the children of Peers are commoners, the characteristic *differentia* of a 'Peer' consisting in 'the hereditary right to a personal summons to Parliament'.<sup>1</sup> This restriction has, as already observed, been of immense significance in the development of our parliamentary institutions as a whole, and has imparted a distinctive character not only to the Upper but to the Lower House. Nowhere else could the 'Third Estate' have contained, as did the English House of Commons from the fourteenth century onwards, a large infusion of men of noble blood, the sons and brothers of the Peers who formed the nucleus of the House of Lords. Mainly indeed to this fact may be ascribed the permanence of parliamentary institutions in this country, as contrasted with the evanescence of the States General of France or the Cortes of the Spanish Kingdoms.

<sup>1</sup> Cf. Freeman, *Historical Essays*, iv. 436; and on the whole of this complicated but interesting question, *Lords Report on Dignity of the Peerage*. 'Peers' must be carefully distinguished from 'Lords of Parliament', some of whom, e.g. Bishops and Law Lords, are not technically 'Peers'.

The above summary, rapid it has been, will suffice to establish the fact that while every important country in the world has, in the constitution of its Legislature, imitated the English bicameral arrangement, not one has been at once willing and able to reproduce the features which distinguish the House of Lords.

In attempting a further analysis of existing Second Chambers, one broad and primary distinction must be drawn: that between the Legislatures of Unitary and those of Federal States.

Of the growth of the federal idea, in modern times, this is not the place to write, but it is pertinent to observe that, whatever may be affirmed of unitary States, bicameralism would appear to be an essential and inseparable attribute of federalism. More than that. It is in the Senate or Upper Chamber of Federal Commonwealths that the federal idea is enshrined: in that Chamber is to be found the primary and effective guarantee for the preservation of this peculiar type of Constitution.

The Senate of the United States of America affords, as we have seen,<sup>1</sup> a conspicuous illustration of this truth. The Senate is composed, and has from the first been composed, of two representatives from each State of the Union. Under a recent Amendment (1913) Senators are elected by direct popular vote instead of by the legislatures of the component States. But this involves a change merely in the machinery of election. It does not touch the root principle upon which the Senate is based—the absolute equality of the States. Had this basic principle not from the outset been accepted and emphasized, had its permanence not been guaranteed by sanctions of peculiar authority, it is safe to say that the Federal Constitution itself would never have come into existence. The jealousy of the smaller States would have been too powerful even for the genius and tact and patience of Alexander Hamilton. It was the idea of equal representation in the Senate which reconciled the

Federal  
Legisla-  
tures

The  
United  
States

<sup>1</sup> *Supra*, c. v.



smaller States to federal union with the larger, and in the Senate State rights are, and from the first have been, enshrined and guaranteed. Of all the fundamentals of the United States Constitution this is held most sacred. 'No State', so the Constitution runs (Art. V), 'without its consent shall be deprived of its equal suffrage in the Senate'—a consent which would not, under any imaginable circumstances, be given. The Senate is no longer, owing to the inclusion of new States, the select body of councillors contemplated by Hamilton and his colleagues. It consists not of 26 members but of 96; nevertheless its essential character remains unchanged, and the eulogies of Lord Bryce are not undeserved. 'The Senate', he writes, 'has drawn the best talent of the nation, so far as that talent flows into politics, into its body, has established an intellectual supremacy, has furnished a vantage ground from which men of ability may speak to their fellow countrymen.'<sup>1</sup> Mr. Henry Cabot Lodge is not less emphatic than Lord Bryce. 'The Senate', he writes, 'has hitherto been one of the most powerful and, as many believe, one of the most useful and effective legislative chambers to be found in the history of the world.'<sup>2</sup>

Switzer-  
land and  
Australia

The same principle as that on which the American Senate was based is to be discerned in the Ständerat of the Federal Republic of Switzerland and in the Senate of the Australian Commonwealth. The Swiss Ständerat consists of 44 members, two for each of the 22 Cantons; the Australian Senate contains six Senators from each of the six States. The Second Chambers of Germany and the Dominion of Canada present interesting varieties. Neither Germany nor Canada is typically federal to the same degree as Australia and the United States. The former is too largely dominated by one of its component States to serve as a model for federalists; the latter possesses a Constitution which, as already indicated, was

<sup>1</sup> *American Commonwealth*, i and iii.

<sup>2</sup> *The Political Quarterly*, No. 1, p. 59.

framed by men with a distinct preference for the unitary principle.<sup>1</sup> In neither case, therefore, do we find the federal idea completely embodied in the Second Chamber.

Whether Demombynes was accurate in refusing to include the Constitution of Imperial Germany among the bicameral constitutions is a question which must not now detain us. It is sufficient for the present purpose that in addition to the Reichstag or popularly elected Chamber there is a Second Chamber or Council, known under the Empire as the Bundesrat, and endowed with important legislative functions. The Bundesrat or Reichsrat is one of the most interesting legislative bodies in the world. Descending historically from the Diet of the Holy Roman Empire it had under the Empire something of the character of a Council of diplomatic plenipotentiaries, and still preserves traces of its origin. Of the fifty-eight members or 'voices' of the Bundesrat Prussia and Württemberg four; Baden, Hesse, and Alsace-Lorraine three; Mecklenburg-Schwerin and Brunswick two; and the rest of the States and free cities one apiece. The Constitution of the German Republic (Reich) ratified at Weimar in 1919 preserved and even accentuated this inequality. Of the sixty-six members of whom the Reichsrat is now composed Prussia contributes twenty-six; Bavaria ten; Saxony seven; Württemberg four; Baden three; Thuringia, Hesse, and Hamburg two each; and the ten other units one apiece. The Delegates were and are appointed by the several State Executives and are bound to vote as instructed by them. The vote therefore is a State vote; and can be given by one delegate, but is multiplied to the power of the State representation.<sup>2</sup>

<sup>1</sup> Notably Sir John A. Macdonald.

<sup>2</sup> The Prussian representatives in the Reichsrat are appointed as to one half by the Government (in Prussia the *Staatsministerium*); but the other half are elected by the Prussian Provinces, one by each. The votes of the Government delegates are, as in the old Bundesrat,

Under the Weimar Constitution the Reichsrat still represents the States (lands), as opposed to the people, both in legislation and administration. Each land has at least one vote and an additional vote for each million of population ; but no land may have more than two-fifths of the total, nor have more than one vote on any committee of the Reichsrat.

Relations  
with  
Execu-  
tive

The relation of the Reichsrat to the Executive is precisely defined. Ministers may claim to be heard in the Reichsrat and if summoned must attend the House or any Committee thereof. It is their constitutional duty to keep the Reichsrat officially informed as to Government policy, and to consult the appropriate committees of the Reichsrat on any question of importance.

Powers

The assent of the Reichsrat must be sought for Government Bills before they are introduced into the Reichstag ; if the Reichsrat refuses assent the Bill may still be sent to the ' lower ' Chamber, but the Government is bound to state officially its reasons for insistence. If the Reichsrat passes a Bill against the advice of the Government the latter must nevertheless introduce it into the Reichstag with a statement of its reasons for opposing the Bill. If the Reichsrat rejects a Bill passed by the Reichstag, and the Government still presses the Bill, the Reichsrat may, with the consent of the President, demand a *Referendum*. If the President refuses his consent to the latter course the Bill lapses. For the initiation of constitutional amendments a two-thirds majority in both Houses is requisite ; but the veto of the Reichsrat is now only suspensive instead of absolute as formerly. It is manifest, therefore, that the place of the Reichsrat under the Weimar Constitution, though far from insignificant, is markedly less important than it was under the Empire.

*instructed*, but the provincial delegates vote freely. Moreover, the provision that no State may have more than two-fifths of the membership of the *Reichsrat* works against Prussia, as she still has about three-fifths of the whole population of Germany. Thus, the authority of Prussia in the present Rat is markedly and designedly inferior to what it was under the Imperial Constitution.

The power of the Canadian Senate, on the contrary, is almost negligible. It now consists of 87 members nominated for life by the Crown, that is by the responsible advisers of the Governor-General. The Senators must, however, be apportioned to the several Provinces of the Dominion in accordance with a scale prescribed by Statute. Originally the idea of federal equality was observed; 24 Senators being assigned to Quebec, to Ontario, and to the Maritime Provinces (New Brunswick and Nova Scotia) respectively: 72 in all. But in subsequent amendments the principle has not been maintained, and the Canadian Senate affords little encouragement to the advocate of bicameralism, from the point of view of composition, procedure, or powers.

Intrinsically interesting, however, as are the Second Chambers of Federal States, they are at present less pregnant with meaning and instruction for the English publicist than are those of unitary States. Should the British Constitution ever be federalized, either in respect of the United Kingdom or of the Empire, the appropriate status and composition and powers of the Second Chamber would demand close re-examination. It has indeed been suggested that the House of Lords might be transformed into an Imperial Senate. But the transformation would not seem to be imminent, and, things being as they are, the unitary Second Chambers are of more immediate interest for purposes of comparison if not of imitation.

The Second Chambers of Unitary, like those of Federal States, may be classified in respect of composition and of powers. We start with the British self-governing Colonies. Nor will it escape observation that, notwithstanding the robustness of their democratic sentiments, not one of them has adopted the unicameral model. For these young communities a House of Lords, with hereditary members was, of course, out of the question; but nevertheless they have, without exception (save for some of the *provincial* legislatures in the Canadian Dominion), adhered to the bicameral principle. Not that there is any

Canada

Unitary  
Second  
Chambers

drab uniformity in the composition of their Second Chamber. Thus, the Union of South Africa combines the nominative and elective principles. Of the 40 members of the Senate 8 are nominated by the Governor-General and 32 are elected by a process of indirect election, in each case for a term of ten years. The Upper Chamber of New Zealand, until 1920 nominated by the Governor, now consists of 3 nominated Maori members and 40 members elected directly, but in large electoral divisions and under a system of proportional representation. The members of the Upper Chambers of New South Wales, Queensland,<sup>1</sup> Newfoundland, Nova Scotia, and Quebec are nominated by the Governor for life; in Victoria, Tasmania, South and Western Australia the Legislative Councils are elected, but on a special and restricted franchise.

Conti-  
nental  
practice

That the British Colonies should have followed the example of the motherland in adherence to bicameralism is perhaps not altogether unnatural. It is more remarkable that the unitary States of Europe should in remodeling their constitutions have shown similar preference. But these also exhibit a great variety of forms. <sup>1</sup> France, Holland, and Sweden have adopted the principle of indirect election. In Denmark 18 members are elected by the members of the outgoing House, and the other 54 by direct election, in both cases on the proportional system. Belgium combines the principles of direct and indirect election.<sup>2</sup> The Italian Senators—apart from the Royal Princes—are nominated by the Crown for life out of a large number of complicated categories. Austria and Prussia combined (before 1918) the nominative and hereditary principles. The Spanish Upper Chamber includes an official, an hereditary, a nominated, and an indirectly elected element: Japan includes all except the first.

The  
French  
Senate

To examine the composition of these chambers in

<sup>1</sup> Queensland, as stated above, has now abolished the Second Chamber.

<sup>2</sup> Princes of the Blood Royal also have seats.

## SENATES AND SECOND CHAMBERS

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further detail is unnecessary: but the French Senate seems to call for more minute analysis. Not only is France unique among modern States in the number and variety of her constitutional exponents, but she has now evolved a Second Chamber which, among those which are the result not of historic tradition but of conscious 'manufacture', is one of the most satisfactory and most efficient.

The existence and rights of the French Senate rest upon a *Constitutional* Law of 1875 which is unalterable save by a special process. Its constitution, on the other hand, was regulated by an ordinary statute, which like any English statute can be amended or repealed in the ordinary way of legislation and without recourse to special machinery. The Senate consists of 314 members who are elected for the term of nine years, one third of the number retiring every three years. The election is indirect, being vested in an electoral college in each Department and Colony, and conducted by *scrutin de liste*. The college is composed of (1) the Deputies for the Department; (2) the Conseil Général of the Department; (3) the 'Arrondissement Councillors'; and (4) Delegates elected from among the voters of the Commune by the Municipal Councils. The Senators are distributed among the Departments on a population basis; the Department of the Seine returning ten; the Nord eight; others five, four, three, two, or one apiece. Senators receive the same salary (15,000 francs) as Deputies. Conjointly with the Chamber the Senate elects the President who may be impeached, but only on a charge of high treason, and with the Senate of Deputies the right of dissolving the Lower House before its legal term has expired. This latter prerogative is plainly one of great importance. In England the Executive can appeal to the electorate against the Legislature, and the House of Commons has the power, subject to that appeal, to dismiss the Executive. In France

neither the Executive nor the Chamber of Deputies can appeal to the electorate. The Ministry of the day has this weapon at its command only if it possesses the confidence of the Senate. In a sense, therefore, the Executive is at the mercy of the Senate, and some of the most distinguished of French publicists have argued, with plausibility, that no Cabinet can continue to govern in opposition to the will of the Senate. In 1890 the Tirard Cabinet resigned on account of a hostile vote in the Senate, and on at least five comparatively recent occasions the Ministry of the day has appealed to the Senate for a vote of confidence.

The Senate has the right, as already observed, to reject money Bills, and except in regard to the initiation of such Bills has concurrent and equal rights with those of the lower House.

Among the Second Chambers of unitary States the French Senate is of peculiar interest alike to scientific students of Political Institutions and to practical reformers. None of the existing Second Chambers would be likely to provide a model for slavish imitation were the task of reconstructing a Second Chamber in England ever seriously undertaken. Nevertheless, the French Senate does undeniably possess certain characteristics which, in such an event, would deserve careful consideration.

Before proceeding to examine some of the schemes which have actually been suggested as a basis for a remodelled House of Lords, it may be well to ask whether the survey, undertaken in preceding paragraphs, appears to suggest any essential attributes which a Second Chamber, if it is to fulfil its appropriate functions, should possess.

Essential  
attributes  
Intelligi-  
bility

The first essential attribute evidently is intelligibility. Every Second Chamber ought to rest upon an intelligible basis. There must be some clear and definite principle at the root of it. The House of Lords does at least possess this advantage. The hereditary principle may be antiquated and unpopular ; but it is at any rate intelligi-

ble. The custom of primogeniture may not commend itself, on scientific grounds, to the Professors of Eugenics, but it is understood, even if it is mistrusted, by the people.

Secondly, the principle upon which a Second Chamber is based ought to be differentiating. Apart from the general agreement in favour of a bicameral system, the plain man ought to be able to explain at once why an Upper Chamber is superimposed upon the Lower. Federal Second Chambers are pre-eminently distinctive. In every case—so far as they are genuinely federal—they represent not the people in the aggregate but the several States of which the Federation is compounded. Thus, the American and Australian Senates are at once historic memorials of the original federal compact and practical guarantees for the preservation of the independence of the component States. The German Bundesrat was at once the organ and the symbol of those 'Princes' of the Empire who joined in the solemn act in the Hall of Mirrors in the Palace of Versailles when the Imperial Crown of the German Folk was placed upon the brows of the Hohenzollern King of Prussia. Nor is the place and purpose of its successor the Reichrat less distinctive and intelligible.

A Second Chamber ought, in the third place, to be independent without being irresponsible. The House of Lords, perhaps because it is technically irresponsible, dare not assert its independence. The French Senate, on the contrary, has courage to assert its independence because it makes no claim to irresponsibility. A Senator no less than a Deputy is elected, but the process of election is clearly differentiated; the legal term of service is three times as long, and the Senate—apart from the Senators—has a continuous existence; above all, as we have seen, it has, with the assent of the President, the power of dissolving the Chamber of Deputies and of compelling the latter to take the opinion of their constituents.



Representation

Plainly, however, a Second Chamber if it is to be entrusted with a function so delicate and so important as that of dissolution must be thoroughly representative in composition. This is not to say that it must needs be elective. There are in the House of Lords nearly all the elements of an assembly ideally representative of the varied interests of which the nation is composed. Industry, agriculture, science, literature, education—all are represented there; spiritual forces no less than material and intellectual find a reflex in that Chamber; great jurists are there, and great soldiers and sailors; experienced proconsuls and successful administrators; except that of manual labour there is scarcely a national interest which cannot find a spokesman. And yet it would be difficult to claim for the House of Lords, in the aggregate, that it is a truly representative assembly. Nor is the reason far to seek. Side by side with a large body of men who could under no circumstances be excluded from any assembly which was genuinely representative of national interests, there is a considerable if not actually a larger body of men to whom admission would indubitably be denied. The weakness of the House of Lords consists, then, not in the absence of competent legislators, but in the possibility that the wisdom and experience of the select few who ordinarily conduct its business may be overborne on critical occasions by the votes of the many who are not so specially qualified.

That any assembly charged with the task of legislative or administrative revision must be efficient for the purpose goes without saying. But to be really efficient it is almost essential that the revising Chamber should be, in relation to the Lower Chamber, manageably small. The House of Lords is bigger than the House of Commons, and is by far the largest Second Chamber in the world at the present moment; it is, as already observed, also among the least powerful. That its practical impotence is either proportioned to, or the result of, its unwieldy bulk would be a proposition hardly susceptible of proof.

But it is undeniable that it has diminished in effectiveness as it has increased in size. Perhaps the two most powerful Second Chambers are the American Senate and the French Senate. The former contains less than a hundred members. If federal comparisons must be excluded we may still remind ourselves that the French Senate with fewer than half the numbers of the House of Lords is at least twice as powerful.

It remains to examine the bearing of these conclusions upon the practical problem of constitutional reconstruction in this country. Of schemes for the reform of the House of Lords there have been, during the last half century, not a few.

In 1869 Earl Russell, who a generation earlier had been mainly instrumental in reforming the House of Commons, tried his hand on the House of Lords. He introduced a Life Peerage Bill, to empower the Crown to create twenty-eight Life Peers, not more than four of whom were to be created in any one year; but the Bill was rejected on the third reading by 106 to 76 votes. An attempt on the part of Lord Grey, also in 1869, to amend the laws relating to the election of representative peers for Scotland and for Ireland, was for the time being shelved by reference to a Select Committee.

In 1874 a Select Committee under the chairmanship of Lord Rosebery recommended various changes in regard to the Scotch and Irish Peerages; but no legislative action was taken, and for the next ten years no further attempt at reform was made. In 1884, however, Lord Rosebery moved for a Select Committee 'to consider the best means for promoting the efficiency of the House'. To this end he advocated (1) the enlargement of the quorum in the Upper House; (2) the introduction of a system of joint Committees of the two Houses of Parliament for the consideration of both public and private Bills; (3) the representation in the House of Lords of the Churches, of the professional, commercial, and labouring classes, of Science, Art, and Literature, and of

Attempts  
to reform  
the House  
of Lords

Earl Rus-  
sell and  
Earl Grey

Earl of  
Rosebery

the Colonies ; and (4) the extension of the system of life Peerages.

He also suggested the possibility of establishing the principle of summoning to the House of Lords consultative and temporary representatives or assessors, to deliberate and advise. The motion was rejected, but four years later he returned to the attack. In moving in 1888 for the appointment of a Select Committee Lord Rosebery laid down certain definite lines upon which reform might be carried into effect. He recommended : (1) That any reform should respect the name and ancient traditions of the House ; (2) that the whole body of Peers, including Scottish and Irish Peers without seats in the House, should delegate a certain number of members to sit for a limited period as representative Peers ; a minority vote necessary ; (3) that a reconstructed House of Lords should also contain a large number of elected Peers, 'elected either by the future County Boards or by the larger Municipalities, or even by the House of Commons, or by all three' ; (4) that life and official Peerages should form a valuable element in a reformed House ; (5) that the proportions of these various elements should be definitely fixed ; (6) that the great self-governing Colonies should be invited to send their Agent-General, or representatives delegated for the purpose, to sit, under certain conditions, in the House of Lords ; (7) that any person should be free to accept or refuse a writ of summons to the House of Lords ; and (8) that any Peer who had refused or had not received a writ of summons to the House of Lords should be capable of being elected to the House of Commons.<sup>1</sup>

In cases of dispute between the two Houses the Lords and Commons were to meet together, and then by certain fixed majorities carry or reject any measure which was in dispute between them.

Once again the Lords rejected Lord Rosebery's suggestions, but in the same session Lord Salisbury carried

Marquis  
of Salis-  
bury

<sup>1</sup> *Report of Rosebery Committee, Appendix A.*

to a second reading a Bill empowering the Crown to appoint as a life Peer any person who had been (a) for not less than two years a Judge of the High Court; (b) a Rear-Admiral or Major-General or of some higher naval or military rank; (c) an Ambassador; (d) in the Civil Service and a member of the Privy Council; or (e) for not less than five years a Governor-General or Governor in the Oversea Dominions, or a Lieutenant-Governor in India. Not more than three such persons were to be appointed in any one year, but the Crown was to be empowered to appoint two other Life Peers on account of any special qualification other than the fore-mentioned. In no case was the total number of Life Peers created under the Act to exceed fifty at any time. In the same session Lord Salisbury introduced a Bill empowering the Crown, on an Address from the House of Lords itself, either temporarily or permanently to cancel writs of summons to Peers.

It is a matter for regret that Lord Salisbury did not persevere in his efforts to reform the Constitution of the House of Lords. His qualifications for the task and his opportunity were alike unique. His failure to carry out structural repairs may well tempt less experienced architects to undertake the work of demolition. The strength of a chain depends on its weakest link; the reputation of the House of Lords depends on the character of its least competent members. Hence the paradox that while the individual opinions of the leading members of that House command respect, its collective opinion counts for little. Had Lord Salisbury brought his views to legislative fruition, the House of Lords would have been both purged and reinvigorated. That the abandoned Bills of 1888 would have done all that is required is not contended; but they would have done something, and have opened the way for more.

During the next twenty years the Unionist Party was almost continuously in power, and it is not without significance that during that period the question of re-

forming the Second Chamber ceased to engage attention. In 1907, however, when the Liberals had regained power, Lord Newton once more tackled the problem. The Bill which he introduced was withdrawn, but a Select Committee was appointed to consider the suggestions which had from time to time been made for increasing the efficiency of the House of Lords in matters affecting legislation.<sup>1</sup>

The Report of this Committee, published in December 1908, forms an epoch in the history of the question. For the first time the leading members of the Upper House showed themselves to be unanimously of opinion that a radical reform of its constitution was urgently required, and to be agreed as to the main lines on which such reform should proceed.

Report of  
Rosebery  
Com-  
mittee,  
1908

The Committee explicitly disavowed the intention 'of designing a new and symmetrical Senate', but they resolved that, except in the case of Peers of the Blood Royal, it was undesirable that the possession of a Peerage should of itself give the right to sit and vote in the House of Lords, and their main recommendation was that the future Second Chamber should consist of six distinct elements: (1) Peers of the Royal Blood; (2) Lords of Appeal in Ordinary; (3) a considerable body (200) of representatives elected by the hereditary Peers; (4) hereditary Peers possessing certain specified qualifications; (5) Spiritual 'Lords of Parliament'; and (6) Life Peers.

To discuss in detail the recommendations of the Rosebery Committee would now be futile. Events refused to wait upon the dilatory times and deferred seasons of the House of Lords. The 'People's Budget' was introduced in 1909, and on the decision of the House of Lords to refer it to the judgement of the people an acute crisis supervened. Events have completely vindicated the financial wisdom of the Lords, but their bold act proved their political undoing.

<sup>1</sup> Report from the Select Committee of the House of Lords. Appendix A (234), December 1908.

## SENATES AND SECOND CHAMBERS

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The Parliament Act, 1911

The Parliament Act deprived the House of Lords of all power over any Bill certified by the Speaker of the House of Commons to be a Money Bill, and put an end to their co-ordinate authority in matters of ordinary legislation. Thenceforward the Lords were to retain only a two-years' suspensive veto. Any Bill still rejected after passing through the House of Commons in three successive sessions might be laid before the King for the Royal Assent, and with that assent become law without the concurrence of the House of Lords.

While this measure was under consideration, but before Lord Lansdowne's Bill it became law, the Peers, at the instance of Lord Lansdowne, offered to the country an alternative—a reformed and reconstituted Second Chamber. Already in the autumn of 1910 the Lords had affirmed two important propositions: first, that henceforward no Lord of Parliament should be allowed to sit and vote in the House of Lords merely in virtue of hereditary right; and, secondly, that it was desirable that the House should be strengthened and reinforced by the addition of new elements from the outside.

In 1911 Lord Lansdowne introduced a Bill framed in the spirit of these resolutions. The new Second Chamber was to be only about half as large as the existing House of Lords and was to be composed of three distinct elements; one hundred Lords of Parliament elected, as Scotch and Irish representative Peers are elected to-day, by the peers from among the peers, only those peers being eligible for election who were qualified by public service; one hundred and twenty Lords of Parliament chosen by some method of indirect election and with regard to the principle of proportional representation; and one hundred Lords nominated by the Prime Minister of the day. In addition, Princes of the Blood Royal, the two Archbishops, and five Bishops, and the Law Lords were to find places in a Second Chamber which would number less than 350 in all.

That a Chamber so constituted should possess powers

co-ordinate with those of the House of Commons was not proposed.

'We desire', said Lord Lansdowne, 'to have a Second Chamber so composed that it will command the confidence of the country by its ability, its experience, its authority, and above all by its independence. We desire that it should be in close touch with public opinion, but not that it should be at the mercy of popular caprice. We desire that it should not be strong enough to resist the House of Commons when the House of Commons represents the deliberate judgement of the country, but that it should be strong enough to make a stand when there is reason to believe that the country has not had an opportunity of expressing its will clearly and deliberately. Such a house we have endeavoured to construct—not upon a site from which every shred and vestige of the old structure has been removed, but preserving the soundest materials which we can find on that site, strengthened and rearranged so that the new chamber, while faithfully serving the democracy, will be strong enough to resist the gusts of passion and prejudice with which all democracies are necessarily familiar.'

Lord Lansdowne's admirable alternative was not, however, accepted; the Parliament Bill became law, and, consequently, since 1911, the Imperial Parliament—a Parliament legislatively responsible for England, Wales, and Scotland severally, for Great Britain, and in a supreme sense for the whole British Empire—has virtually, though not technically, approximated to a unicameral form.

The  
Second  
Chamber  
Conference,  
1917-18

That the *torso* of 1911 was never designed to be anything more than a temporary makeshift is proved by the terms of the Preamble to the Parliament Act. With all the solemnity which can attach to a Preamble the Legislature declared that 'it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis'. That pledge remains<sup>1</sup> unfulfilled. With a view to redeeming it, the Government in 1917 appointed a Committee, drawn in equal proportions from the two Houses,

<sup>1</sup> Written in 1923.

to inquire and report : as to the nature and limitations of the legislative powers to be exercised by a reformed Second Chamber ; as to the best mode of adjusting differences between the two Houses of Parliament and as to the changes which are desirable in order that the Second Chamber may in future be so constituted as to exercise fairly the functions appropriate to a Second Chamber. The Committee sat, under the chairmanship of Lord Bryce, for more than six months, and held nearly fifty prolonged sittings. The whole subject was exhaustively explored, but the scheme recommended by the Committee lacked both the simplicity and symmetry of the French Senate and the boldness of conception which distinguished the work of Hamilton and his colleagues in America.

The numbers of the new Chamber were not to exceed 350-400. Excluding Peers of the Blood Royal and Law Lords who were to remain as at present, the new House was to consist of two sections : (i) about 273 members elected by panels of members of the House of Commons distributed in 14 or 15 geographical groups ; and (ii) not more than 91 members chosen by a Joint Committee of both Houses. The latter were in the first instance to be selected from among the hereditary or spiritual Peers ; ultimately the choice was to be unrestricted provided that the number of Peers and Diocesan Bishops never fell below thirty. The Second Chamber was to have no power of amending or rejecting or initiating Financial Bills, but otherwise was to have concurrent rights of legislation. Differences between the two Houses were to be adjusted by the method of 'Free Conference'—the Conference to consist of a Joint Standing Committee of forty members appointed sessionally in equal proportions by the Committee of Selection in each House, with the addition of ten members from each House appointed *ad hoc* in respect of each Bill in dispute.

Such is the latest and most elaborate of the many attempts which have been made to adapt an historic

Its Re-  
port



institution to the needs and conditions of a democratic age. From the Report of the Bryce Committee any reconsideration of the question must take its start; though it is unlikely that the practical scheme recommended by that Committee will be accepted in its entirety. Still, it covers the ground of Second Chamber reform more thoroughly than any of the schemes which preceded it. It deals, as every scheme must, with the composition of the proposed Chamber; it carefully defines its powers, and suggests a method of adjusting differences between the two Houses.

Structure, Powers, and Procedure—these are of the essence of the problem of the Legislature. The Second Chamber problem is not the least important factor in the wider problem, nor the least difficult. To devise and construct a satisfactory Upper House; to discover for it a basis at once intelligible and distinctive; to confer upon it the power of effective revision, without the power of control; to render it amenable to the more permanent sentiments of the people, and yet independent of transient phases of opinion; to erect a bulwark against revolution, without interposing barriers to reform;—this is a task which may test the ingenuity and baffle the patience of the most skilful and experienced of political architects. Yet it represents a primary need of every civilized State.<sup>1</sup>

<sup>1</sup> It is noteworthy that among the post-war States, the following have adopted the *bicameral* principle in their Legislatures: Poland, Czechoslovakia, the Austrian Republic, and the Southern Irish Free State. The following are *unicameral*: Jugo-Slavia, Esthonia, Latvia, and Lithuania (cf. *Select Constitutions of the World*. Dublin, 1922.)

## XVI. THE PROBLEM OF THE LEGISLATURE

### (iii) Powers: *Constitutional Revision*

'The principle of Parliamentary sovereignty means neither more or less than this, namely, that Parliament has, under the English Constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.'—DICEY.

'The power and jurisdiction of Parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. And of this high court, he adds, it may be fairly said, "Si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima." It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms.'—BLACKSTONE'S *Commentaries*.

'No one can have greater respect for the independence of the legislative power than I: but legislation does not mean finance, criticism of the administration, or ninety-nine out of the hundred things with which in England the Parliament occupies itself. The legislature should *legislate*, i. e. construct grand laws on scientific principles of jurisprudence, but it must respect the independence of the Executive, as it desires its own independence to be respected. It must not criticize the Government.'—NAPOLEON I to the ABBÉ SIEYÈS.

'SIX HUNDRED talking asses, set to make laws, and to administer the concerns of the greatest Empire the world had ever seen.' Thus did Thomas Carlyle, in petulant mood, characterize the composition, and summarize the functions, of the British House of Commons. Yet, by common consent, the powers and functions entrusted to a Legislature, their nature, extent, and limits, are matters of supreme concern to the well-being of the modern Commonwealth, and they call for more detached and less choleric consideration

The Powers of the Legislature

Omnipo-  
tent or  
limited ?

The primary question to be determined is whether the Legislature shall be entrusted with powers legally omnipotent, or whether its power shall be circumscribed ; and, in the latter alternative, how the limitations shall be imposed and enforced. The British Parliament—the King in Parliament—affords the classical example of an omnipotent Legislature. Legally, as we have already indicated,<sup>1</sup> there are no limits to its competence : there is no tax which it cannot impose ; no law which it cannot enact, repeal, or amend ; no act of the administration which it cannot investigate, and, if need be, censure. Its functions are therefore at once constituent and legislative, and it is charged with the duty of criticism and control of the Executive. Not only can it make laws without reference to the electorate, whence in a political sense it derives its powers, but can profoundly modify and indeed revolutionize the Constitution itself. Among the great States of the modern world there is none which has entrusted the Legislature with powers so vast. Some limit, general or precise as the case may be, has invariably been imposed upon the legal competence and activity of the Legislature.

Limita-  
tions  
upon the  
powers of  
the Legis-  
lature

Such limitations are in some cases imposed by an Instrument or Constitutional Code, in others by Organic Laws (as in France) ; in some by a rigid adherence to the doctrine of Separation of Powers, by assigning precise functions to the Executive or the Judiciary ; in others by reserving certain powers or functions to the electorate. In particular, as we have seen, modern Constitutions have generally been careful to provide, with more or less precision, against any alteration of the Constitution itself by the ordinary operation of the legislative machinery.

Federal  
Legisla-  
tures

Exceptionally precise are the precautions of Federal Constitutions. Such precautions are indeed of the essence of Federalism ; for Federalism implies a covenant between a number of independent political communities, each possessed within its sphere of quasi-sovereign authority.

<sup>1</sup> Cf. chapters vi and vii, *supra*.

This is conspicuously true of Federal Republics, like the United States of America and the Swiss Confederation, and the truth is reflected in their respective Constitutions. For the amendment of the Federal Constitution of the United States elaborate machinery has, as already indicated, been provided. Amendments may be initiated at the instance of two-thirds of both Houses of Congress or by two-thirds of the State Legislatures, but they cannot become law until they have been ratified either by at least three-fourths of the State Legislatures, or by an equal number of Conventions specially summoned for the purpose in each State.

The  
United  
States

Even more elaborate are the laws which govern the process of constitutional amendment in the Helvetic Republic.

Switzer-  
land

Total revision must be proposed if a resolution in favour of it passes either House of the Federal Assembly, or on a demand made by 50,000 duly qualified Swiss voters. The question whether the Federal Constitution shall be totally revised must then be submitted in general terms to a *referendum*. If a majority of those voting pronounce in the affirmative there must be a general election of both Councils for the purpose of undertaking the revision. Partial revision must be initiated either by a vote of both Houses or on the demand of 50,000 voters. In the latter case the 'initiative' may be either 'general' or 'formulated'. If the initiative petition is presented in general terms and the Federal Assembly concurs, the latter drafts an amendment and presents it for acceptance or rejection to the people and the Cantons. If the Legislature does not agree, it must submit the question of revision 'aye' or 'no' to the people, and if the result of the *referendum* is affirmative the Legislature must do its best to carry out the popular will, even against its own better judgement.

But in the 'formulated initiative' the Swiss democracy possesses, as we have seen, an even more powerful weapon. Any 50,000 voters may not merely demand

revision, but may actually draft a specific amendment, hurl it at the head of the Legislature, and compel the latter, whether it approve or disapprove, to submit the amendment unaltered for acceptance or rejection by the people and the Cantons. If the Federal Assembly disapprove the amendment it may submit a counter-project of its own as an alternative to that formulated by the petitioners, but more it cannot do to guide or control public opinion. In no event can revision, total or partial, take place, until the new Constitution, or the amendments to the old, have been approved by a majority of those voting thereon, and also by a majority of the Cantons.

Australia The Commonwealth of Australia is not far behind Switzerland and the United States in the precautions it has taken in regard to constitutional innovations. Under the Australian Commonwealth Act every proposed amendment of the Constitution must in the first instance pass both Houses of the Federal Legislature, or that failing must pass one of the two Houses twice, with an interval of not less than three months between the two deliberations. It must then be submitted to the electorate by means of a *referendum*, and in order to become law must be approved : (i) by a majority of votes in the Commonwealth as a whole ; and (ii) by a majority of votes in each State—a concession to the feelings of the smaller and weaker States—; and it is further provided that the representation of no State can be altered without its own assent. Had it not been for these provisions, added to that which secures equal representation in the Senate for all States (an imitation of the American system), there would have been slight possibility of inducing the smaller States to come into the federal union, though in Australia, as elsewhere, there is a pronounced tendency to increase the powers and functions of the Federal Government at the expense of the component States.

Canada The Dominion of Canada presents a much less perfect type of federalism than the Commonwealth of Australia, or the Republics already mentioned, being made up not

of 'States', but of 'Provinces' which possess such powers only as are specifically assigned to them by the Constitution. Moreover, that Constitution being embodied in an 'ordinary' statute of the Imperial Legislature can, in the absence of express provisions to the contrary, be repealed and amended like any other Act of the Imperial Parliament, and by that method only. The absence of any local machinery for amending the frame of government supplied one of the many elements of friction which impaired the working of Pitt's Constitution of 1791. The Assembly of Lower Canada presented petitions for constitutional amendment to the Imperial Government, and when Great Britain failed to respond the Assembly boldly claimed the right of constitutional amendment for itself. But that right has never been conceded. The British North America Act, unlike the subsequent Acts for Australia and South Africa, provided no machinery for its own amendment, and indeed made no reference to the matter, tacitly assuming the unimpaired and undivided sovereignty of the Imperial Parliament. And while the Dominion has thus far acquiesced, the Provinces, or some of them, are insistent upon the maintenance of this principle. Consequently all amendments in the Constitution of 1867 have, with the exception of some trifling changes, been effected by the Imperial Parliament. This constitutes, as a recent commentator has pointed out, 'an undoubted and serious curtailment of Canadian autonomy,'<sup>1</sup> and in some quarters it is on that ground resented. But it is important to observe that the Act of 1867 embodied an arrangement virtually amounting to a covenant, locally concluded, between the Federal Dominion on the one hand and the Constituent Provinces on the other. The terms of that covenant can plainly be varied only with the assent of both or all parties. The Provinces, on their side, are not likely to agree to any amendment which would tend to circum-

<sup>1</sup> W. P. M. Kennedy, *The Constitution of Canada* (Milford, 1922), p. 451.

scribe their legislative sphere, nor to confer upon the Federal Government powers which would enable them to do so. Moreover, as Mr. Kennedy has forcibly pointed out, the situation is complicated by 'the peculiar religious and racial groupings in Canadian federalism'.<sup>1</sup> Consequently, the likelihood of an official demand from the Dominion for such a variation of the Principal Act as would confer upon Canada powers similar to those possessed by the Commonwealth of Australia is greatly diminished if not rendered altogether remote.

South  
Africa

The Union of South Africa occupies, in regard to constitutional revision, a position which seems to be unique. Not only is its Constitution, with very small exceptions, flexible, but it is definitely declared to be so in the Act. It is true that certain clauses of the Act—those which refer to the composition and election of the House of Assembly and that which decrees the equality of the English and Dutch languages—cannot be amended or repealed except by a two-thirds majority in a joint sitting of the two Chambers; but the general competence of the Dominion Parliament to amend the Constitution itself is asserted in express terms. Section 152 declares: 'Parliament may by law repeal or alter any of the provisions of this Act, provided that no provision thereof for the operation of which a definite period of time is prescribed, shall during such period be repealed or altered.' In other Constitutions flexibility may perhaps be presumed by silence in respect to constitutional amendments, but there is no other *Instrument* known to me which deliberately and explicitly confers constituent authority upon the ordinary Legislature and confides the task of constitutional revision, with a few reasonable exceptions, to the ordinary processes of legislation.

The Constitution of United South Africa, as already indicated, is technically unitary; had it assumed the federal form it could not have afforded the luxury of flexibility. But though a unitary State is not under the

<sup>1</sup> W. P. M. Kennedy, *The Constitution of Canada* (Milford, 1922), p. 451.

obligation of rigidity, yet few unitary States have deemed it prudent to dispense altogether with safeguards against rash and hasty innovations in the framework of the Constitution.

Among European Constitutions the two most closely resembling our own in respect of *flexibility* are those of Italy and Spain. Both are written, but neither is rigid. Neither contains any special provision for constitutional as distinct from ordinary legislation. It is, however, worthy of note that the eminent jurist, M. Brusa, has affirmed that the fundamental bases of the Italian Constitution, as established by the plebiscites, are outside the range of ordinary Parliamentary action.<sup>1</sup> Nevertheless amendments to the *Statuto* have, in fact, been effected by ordinary legislative process, while M. Brusa's assertion rests on nothing better than opinion. The earlier experiments of Spain in Constitution-making (e. g. those of 1812, 1857, and 1869) contained special provisions for constitutional revision. In the latest attempt—that of 1876—they are omitted, and it is assumed that changes, if demanded, will be effected by the ordinary legislative process.<sup>2</sup>

The Constitution of France is not technically flexible, but revision can be effected by a relatively simple process.

Article 8 of the Constitutional Law on the organization of the Public Powers (25 February 1875) runs as follows :

'The Chambers shall have the right by separate resolutions, taken in each case by an absolute majority of votes, either upon their own initiative or upon the request of the President of the Republic to declare a revision of the constitutional laws necessary.

'After each of the two Chambers shall have come to this decision, they shall meet together in National Assembly to proceed with the revision.

'The Acts effecting revision of the constitutional laws, in whole or in part, shall be passed by an absolute majority of the members composing the National Assembly.'

<sup>1</sup> *Ap. Marquardsen, Handbuch des Öffentlichen Rechts.*

<sup>2</sup> Or, as we have since learnt, by a totally different method.



By an amendment of 1879 the seat of the Executive and Legislative power was transferred from Versailles, where it was fixed in 1875, to Paris ; but it was at the same time provided that joint sessions of the two Chambers, meeting as the ' National Assembly ' for the purpose of revision, should continue to take place at Versailles. By a further amendment of 1884 it was ordained that ' the republican form of government shall not be made the subject of a proposed revision ' and that ' members of families that have reigned in France are ineligible for the presidency of the Republic '.

The  
Organic  
Laws of  
1875 and  
1884

The Organic Law of 1875 was in several respects a notable departure from French tradition. Hitherto, as Mr. Lowell has pointed out, ' it had been the habit in France to make a sharp distinction between the Constituent and legislative powers, the former being withdrawn to a greater or less extent from the control of the Parliament '. The new Republican Constitution still retained some distinction, but revision was rendered relatively easy. Nor was the reason obscure. Both parties—all parties—regarded the settlement of 1875 as purely provisional. Monarchists still looked for a restoration of one of the royal Houses ; republicans hoped to establish the Republic on a basis far more permanent and effective than any which was available or permissible in 1875. Each party wished, in order to facilitate the realization of its own ambition, to leave the Constitution as flexible as might be. By 1884 things had changed ; the Republic had weathered several storms ; the Prince Imperial had fallen in South Africa ; the Bourbons were divided among themselves and had alienated much sympathy in France ; the republicans, therefore, felt strong enough to insist that the republican form of government should be excluded from the competence alike of the ordinary Legislature and the National Assembly. In one sense France may be thought to have drifted away from the democratic principles to which under all her varied forms of government she had paid continuous

homage since the great eruption of 1789. The doctrine of the sovereignty of the people, the theory of the 'general will', seems to find faint reflection in the existing Constitution of France.

The explanation is not far to seek. The principle of direct democracy had suffered a rude shock from the sinister use which had recently been made of the plebiscites. But behind the 'organic laws' there is a dominating fact which no mere study of constitutional texts can reveal. In the mind of every French republican the Declaration of the Rights of Man of 1789 is a fundamental presupposition, anterior and superior to any and every Constitution. 'Sovereignty resides in the nation. No individual or body of individuals can exercise authority which does not proceed directly from it.' So ran the third clause of that famous document. The seventh proceeds: 'Law is the expression of the general will. All citizens have the right to participate in its formation either personally or through representatives.' The plebiscites were, therefore, as regards machinery, in complete harmony with French tradition and ideas. That they were prostituted to subserve the ambition of individuals has undoubtedly inspired Frenchmen with some suspicion; but they were essentially akin to the principle of direct, as opposed to representative, democracy which has never since 1789 ceased to fascinate the French mind. M. Borgeaud lays especial emphasis upon the continued and permeating influence of the Declaration of the Rights of Man. 'Its principles', he writes, 'permeate French legislation, dominate French public life. . . . It is invoked in the courts. It is no longer part of the written law of France . . . but it is none the less the law of France.'<sup>1</sup> In any attempt to interpret the existing Constitution of France this is a truth which we shall ignore at our peril.

The minor European States are even less confiding than France in the prudence of the Legislature. As a rule

The Sovereignty of the people

Scandinavia

<sup>1</sup> *Établissement et révision des Constitutions* (American translation, pp. 198, 199).

their Constitutions rest upon a deliberate compact between Prince and people. It is logical, therefore, that amendments should require the assent of both parties. To this rule an exception is to be found in Norway, where the King forms no part of the Constituent Legislature. The Constitution of Norway is, however, peculiarly rigid. The 112th Article runs as follows :

‘ If experience should show that any part of the Constitution of the kingdom of Norway ought to be altered the proposed amendment shall be presented in one of the regular sessions of the Storting and published in the Press. But it is only within the power of the Storting at one of its regular sessions after the next election to decide whether the proposed change shall or shall not be made. However, *such an amendment shall never contravene the principles of this Constitution*, but shall only relate to such modifications in particular provisions as will not change the spirit of this Constitution, and in the alteration two-thirds of the Storting must concur.’

The words which I have italicized are very remarkable. They represent an attempt to establish an Instrument which in essentials shall be not merely fundamental but unalterable. The principle of rigidity could hardly be carried farther. Strictly interpreted, it must mean that a fundamental change in the Constitution can be effected only by revolution. Even for minor changes there must be a double deliberation with a General Election intervening. The same principle obtains in Sweden : double deliberation and an appeal to the electorate. But the Swedish Constitution is, in form at any rate, far more respectful to the prerogative of the King who possesses not merely, as in Norway, a suspensive, but an absolute veto upon proposed legislation, whether ordinary or organic.

Very similar is the procedure in Denmark. If an amendment to the Constitution is passed by both Houses, and the Crown approves, the Rigsdag must be dissolved and a General Election held both for the Folketing and for the Landsting. If the newly elected Rigsdag adopts

the proposed amendment *without change* and the King approves it, it becomes forthwith part of the Constitution. Iceland follows exactly the rule in Denmark. In the Netherlands also both Houses must be dissolved, and the newly elected States-General must adopt the amendment by a two-thirds majority of the votes cast. In Belgium, as soon as the Legislature has declared for revision, both Houses are *ipso facto* dissolved. In the new Parliament there must in each House be a quorum of two-thirds, and no amendment can become law unless in each House it is supported by a two-thirds majority. Greece, like Norway, sets aside the Royal Prerogative in cases of revision, but, also like Norway, permits no alteration of fundamentals, and allows only the amendment of relatively unimportant details.<sup>1</sup>

To push our investigations farther into the machinery of constitutional amendment in the minor European States would yield little variety of custom. The general principle which underlies all these constitutions is sufficiently summarized by M. Borgeaud as follows :

'The Latin and Scandinavian group have . . . accepted from the modern theory the principle of consultation of the people. They confide the revision of the Constitution to the established authorities but the final decision is reached only after the complete renewal of the popular chamber by general elections, or by the temporary substitution of a special assembly invested with full powers in the place of the ordinary legislature.'<sup>2</sup>

The provision for constitutional revision, in the successive Constitutions of 1867, 1871, and 1919, affords an admirable illustration of the half-hearted federalism of modern Germany. Less rigid than that of unitarian France, all those Constitutions have been much more flexible than those of genuine Federal States such as Switzerland and the Australian Commonwealth.

The North German Confederation of 1867 ordained that

The  
German  
Reich

<sup>1</sup> Written before the abolition of the Monarchy in Greece.

<sup>2</sup> *Op. cit.*, p. 334.

constitutional amendments must obtain the assent of two-thirds of the *Bundesrat*, and the same principle, though differently applied, reappeared in the Imperial Constitution of 1871.

Under the terms of that document the Federal Constitution could be amended by the *Reichstag*, by the ordinary process of legislation, subject only to two limiting provisions: first, any amendment could be defeated by fourteen negative votes in the *Bundesrat*; and, secondly, no State could be deprived of any rights guaranteed to it by the Constitution without its own consent. The significance of the first provision will be appreciated only if it be remembered that Prussia in its own right possessed seventeen out of fifty-eight votes in the *Bundesrat*. Prussia alone, therefore, could veto any amendment. Similarly any amendment could be defeated by a coalition of the small or single-member States, or by concert among the middle States. The second proviso afforded on paper a considerable measure of security to the smaller States, but jurists were divided in opinion as to the real extent of the privilege. The rights specifically guaranteed to the States by the Constitution were few in number, and the States retained their general rights only by sufferance of the Empire. Nor was this practical flexibility out of harmony either with the spirit of the German polity, or with the historical origins of the Hohenzollern Empire. The rigidity of the Constitutions of Australia and Switzerland, the necessity for obtaining the assent of the States and Cantons respectively to constitutional changes, accurately reflects the circumstances to which these two Federations owed their birth. The national Constitutions are, in both cases, the result of a pact between the Constituent States. In Germany, on the contrary, the Empire was the creation of the Hohenzollern, and it was therefore natural that Prussia should dominate the *Bund*, and that the Constitution should consequently retain considerable, though far from complete, flexibility.

The present Constitution, adopted by the National

Assembly at Weimar on 31 July 1919, is based upon that of 1871, just as the Imperial Constitution of 1871 represented an adaptation of the North German Confederation of 1867. It declares, indeed, that the German Realm (*Reich*) is a Republic, but when the French draftsmen at Versailles translated *Deutsches Reich* by *République allemande* objection was taken by Herr Müller, then Foreign Secretary of Germany; and *L'Empire allemand* was substituted.<sup>1</sup> On the point of constitutional revision the Instrument ordains (Art. 76) that the Constitution may be 'legislatively' amended; that is, presumably by the ordinary legislative procedure. Such amendments, initiated by the *Reichstag*, are valid only if two-thirds of the accredited members are present, and at least two-thirds of those present record their votes. In the *Reichsrat* (which like the old *Bundesrat* represents the States or *Lands*) a majority of two-thirds of the recorded votes is required. The *Reichsrat* possesses a suspensive veto. If, however, the *Reichstag* insists upon the proposed amendment, the *Reichsrat* may within two weeks of the passing of the measure demand that it shall be submitted to a plebiscite; but it cannot be negatived unless a majority of the voters record their votes.

In this, as in other matters, the balance of power has, under the Weimar Constitution, decisively shifted from the *Reichsrat*, the representative of the States, to the *Reichstag*, which directly represents the people, but as in the old *Bundesrat* representation is unequal, being based on one vote for each million of inhabitants. Like the old *Bundesrat*, again, its members must be members of the several State Governments.<sup>2</sup>

Even more significant of changed conditions is the inclusion of the referendum and the Popular Initiative. Any law passed by the *Reichstag* must, if the President of the *Reich* so decides, within a month be submitted to

<sup>1</sup> The precise rendering of *Reich* remains, however, a diplomatic obscurity as a subsequent treaty contains the expression *république allemande*.

<sup>2</sup> See note, p. 415, *supra*.

popular plebiscite. If the proclamation of the law has been deferred on request of one-third of the members of the *Reichstag*, a popular plebiscite must take place if it be demanded by one-twentieth of the voters.

Nor have the primary electors merely a negative voice. One-tenth of the voters may demand the submission of any project of law to a popular plebiscite, provided the project is embodied in a Bill which has been completely drafted. In this case the National Government must inform the *Reichstag* of the request, and must submit a statement of its own views. If the *Reichstag* is prepared to accept the proposed Bill, without amendment, no plebiscite need take place. In other words ten per cent. of the electorate can propose to the Legislature a Bill in complete form and can demand either its enactment, in unamended form, or its submission to a vote of the people (Art. 73).

✓  
Conclu-  
sions and  
Queries

To what conclusions then, if any, does the foregoing survey appear to point? One at least seems clear: that among the Legislatures of the modern world the British Legislature is, save for those which are directly modelled upon it, unique: none equals it in the range of its legal powers; few approach it. Among those which lack its legal omnipotence, some are circumscribed by the Instrument under which they operate; some by the existence of competing and co-ordinate authorities; some by the provision of devices such as the *Referendum* and the *Initiative*, which vest in the electorate an appellate jurisdiction, and even constitute a rival legislative organ.

Can any Legislature be safely entrusted with such unlimited power? Is parliamentary omnipotence compatible with democratic principles? Is it prudent to vest in a single body, employing for both purposes identical machinery, the function of ordinary legislation and also that of constitutional revision? Is the British electorate over-confiding in the wisdom of its representatives, or have the makers of foreign Constitutions

shown themselves unduly suspicious? Federal Constitutions are, plainly, in a class apart: they represent, as we have seen, a compact or covenant between States, formerly in a position of virtual if not complete independence, and, under such circumstances, there could be no question of entrusting to a federal legislature unlimited powers. Are the circumstances of unitary States so entirely different as to justify a contrary policy?

Half a century ago the student of English political institutions would probably have answered this question with an unhesitating affirmative. To-day, though the final judgement might coincide, it would be less quickly reached and less confidently affirmed. Nor is the reason far to seek. The smooth working of Parliamentary Government has, in England, been greatly facilitated by, if it is not actually dependent upon, the maintenance of the two-party organization. Nor were the two parties—Whigs and Tories, Liberals and Conservatives—really divided on fundamental principles of government. The Whigs, it is true, relied for support more particularly upon the monied interest, the manufacturing and trading towns, and the Nonconformists, and may have regarded political offices as the hereditary preserve of a small knot of 'revolution' families; the Tories were somewhat more regardful of the Royal Prerogative and perhaps more deferential to the personal wishes of the monarch; they relied for support primarily upon the landed interest and the Established Church; but on fundamentals both parties were agreed: upon the maintenance of a limited monarchy, of a responsible ministry, a bicameral legislature, and a Church which though tolerant of Dissent was in close connexion with the State. Nor did any question of economic organization or even trade policy seriously divide them. Moreover, the representatives of both parties in Parliament were men belonging in the main to the same class, who had been educated at the same schools and colleges, had served in the same regiments, and had common tastes and pursuits. After 1832 there

Parliamentary  
Omnipotence and  
Party Government



was an increasing infusion of manufacturers and merchants, but unless, like Peel and Gladstone, they belonged to the aristocracy of commerce and had been educated at Eton or Harrow, at Oxford or Cambridge, they rarely reached Cabinet rank. John Bright's inclusion in the Cabinet of 1868 was regarded as a portent.

After 1885 the supremacy of the two-party system was rudely shaken by the intrusion of a third party, whose members were not only drawn from a different social class, but were sharply divided from both the historic parties on a fundamental question of policy.

During the Parliament of 1880 the Irish Separatists, under the skilful leadership of Parnell, deliberately attempted to bring parliamentary government into contempt by their obstructive and disorderly tactics. The extension of the Suffrage Act of 1884 to Ireland gave Parnell an opportunity which he was quick to utilize, and to the Parliament of 1885 the Parnellites returned in numbers sufficient to hold the balance between the Conservatives and Liberals. The Home Rule Bill of 1886 registered the recognition of this fact. From 1886 to 1906, however, the Unionist preponderance was so great that the Gladstonian Liberals, even with Parnellite support, were powerless. From 1906 to 1910 the Radicals were in a similarly fortunate position; but from 1910 until the outbreak of the war, Mr. Asquith's tenure of office depended upon the complaisance of Mr. Redmond's Irish followers. The price of complaisance was an undertaking that a Home Rule Act should be placed upon the Statute Book at the cost of a complete readjustment in the balance of the British Constitution.

The Par-  
liament  
Act and  
Parlia-  
mentary  
Omni-  
potence

✓ The passing of the Parliament Act (1911) rendered it impossible for the House of Lords to delay for more than two years the enactment of a Home Rule Bill, or any other Bill sent up to it in three successive sessions by the House of Commons, while depriving it of all control over taxation and finance. Thenceforward, the Second Chamber was reduced to legislative impotence, and the

British Legislature became in all but name virtually unicameral.

Yet the King in Parliament retains legislative sovereignty. Once elected, the House of Commons can work its will unhindered in legislation, and can sustain in power an Executive which has received no mandate from the electorate. The Second Chamber lost the power, which it formerly enjoyed, and not infrequently exercised, of compelling an appeal from the legal to the political sovereign; the electors gained the right of exercising their authority at intervals of five instead of seven years; but how slight a barrier that right interposed to the autocracy of Parliament was proved during the Great War, when Parliament, by successive Acts, prolonged its own existence for three years, and might legally have prolonged it for thirty.

Thus not only is the British Parliament unique in its freedom from all legal restraints upon its competence; it is almost unique, also, in the extent to which its legal powers have been concentrated in a single Chamber.

Nor can the significance of another element in the situation be ignored. So rapid has been the development in the legislative activity of Parliament, so numerous and varied are the problems with which, in the course of a single session, it is called upon to deal, that there is serious danger, lest in the process of legislation the fundamentals of the Constitution should be, perhaps inadvertently, or it may be designedly, impaired. Between 'ordinary' laws and 'constitutional' laws there is, as we have seen, no distinction in this country. The process of enactment is the same, whether Parliament has in hand a Bill for the legitimization of children born out of wedlock or a Bill for conferring a Constitution upon a great Dominion, or for curtailing the powers of one of the two branches of the Legislature. Nor does the judiciary differentiate in any way whatsoever between them: an Act of Parliament is an Act of Parliament, whether its effect be to protect the funds of Trade Unions,

Undis-  
crimi-  
nated  
Legis-  
lature

to destroy the legislative union between England and Ireland, or to disendow and disestablish the Church in Wales.

Conven-  
tions v.  
Charters

Does the situation, thus analysed, justify apprehension in the minds of those who have a jealous regard for political liberty ; or is it one in which, relying upon the innate political sagacity, the traditional aversion to extremes, the love of fair play and the instinct for compromise generally attributed to the British people, we may safely continue to acquiesce ? To this question contrasted temperaments will dictate contradictory answers. Men who are temperamentally inclined to acceptance of the political philosophy of Burke will not merely acquiesce in the existing situation, but will resent the suggestion that liberties are rendered the more secure by the guarantee of charter or scrip. In their view no external safeguards will avail to preserve free institutions if the spirit of a people be atrophied. Men of less buoyant temper and less robust faith tend, on the contrary, to the view maintained by Alexander Hamilton, and by those Puritan lawyers of the seventeenth century from whom, much more than from Burke or Chatham, the fathers of the American Constitution descended.

If, however, we may no longer venture to rely upon the conventions of a Constitution, which is for the most part unwritten, in what directions shall we look for those additional safeguards which, while calculated to give free play to the fulfilment of democratic aspirations, shall curb the omnipotence of a sovereign legislature ?

## XVII. SAFEGUARDS, CHECKS, AND LIMITATIONS

### *The Referendum and the Initiative*

'Every Government in Europe or America which has conceded the principle of universal or nearly universal suffrage has at once set about finding indirect methods of nullifying its generosity. The polity of the United States is a perfect network of checks, cunningly devised against that old bogey, the violent and thoughtless caprice of the people.'—F. W. BUSELL.

'The laws reach but a very little way. Constitute Government how you please, infinitely the greater part of it must depend upon the exercise of powers, which are left at large to the prudence and uprightness of Ministers of State. Even all the use and potency of the laws depends upon them. Without them your Commonwealth is no better than a scheme upon paper and not a living active effective organization.'—EDMUND BURKE.

'Dès qu'on écrit une constitution elle est morte.'—JOSEPH DE MAISTRE.

'There must somewhere in every Government be a power which can say the last word, can deliver a decision from which there is no appeal. In a democracy it is only the People who can thus put an end to controversy.'—VISCOUNT BRYCE.

'Every Referendum is an attack on the representative principle.'—LORD LOREBURN (1911).

'It may well be doubted whether the doctrine of Parliamentary Sovereignty, in any form that means much can long survive the triumph of democracy. . . . When the Referendum really comes, the Sovereign Parliament must go.'—McILWAIN, *High Court of Parliament*.

FOR many generations Englishmen have been taught to believe that the highest type of democracy, attainable under the conditions of the modern State, is that which expresses itself in representative government. English publicists have analysed the preconceptions which underlie the theory of Parliamentary Democracy; English statesmen have laboured to bring it, in practice, to perfection. The theory involves, as we have seen, the acceptance of the doctrine of parliamentary sovereignty, and by consequence the negation of the doctrine of the

Sovereignty

sovereignty of the people. In practice, the conflicting sovereignties have been, in large measure, reconciled, by that spirit of forbearance and compromise—the refusal to push theories to their logical conclusion—which Englishmen believe to be peculiarly characteristic of English politics, alike in the sphere of action and of thought.

Referen-  
dal De-  
mocracy

Yet in neither sphere has the English type of Democracy commanded unquestioned allegiance. Rousseau, himself the citizen of a City Republic, contemned the English people as little better than slaves, since, in the intervals between parliamentary elections, they alienated that sovereignty which is in its nature inalienable. The principle of Direct Democracy, most perfectly exemplified in the City States of ancient Greece, has never been abandoned by the Swiss people, and still permeates their political institutions, alike in the Cantons and in the Federal Commonwealth. The influence of the same principle may be detected, though in an attenuated degree, in all those Constitutions which, as indicated in the preceding chapter, reserve certain powers to the electors or impose certain restrictions upon the elected legislatures.

The legal competence of legislative bodies may be limited either by a written Instrument or Constitutional Code, or by the superior or co-ordinate authority of the Executive or Judicial organ, or by the reservation of powers to the Electorate; or in more than one of these several ways.

The  
Common-  
wealth  
and the  
Protec-  
torate

Even in England there was at one period an attempt, as already indicated, to limit the legal competence of Parliament. The Puritan lawyers and soldiers of the Commonwealth having abolished the Monarchy and the House of Lords were in no mood to confer unlimited authority upon a single legislative Chamber.<sup>1</sup> The principle of a 'paramount law' had already appeared in *The Agreement of the People*, a document drafted by some of the Extremists in October 1647. Under that proposed Constitution the power of the 'Representatives' (or elected legislature) was to extend to 'the enacting, altering, repealing, and

<sup>1</sup> See *supra*, Book III, c. vi.

declaring of laws, and the highest and final judgement concerning all natural and civil things'. But even in regard to things natural and civil six matters were specifically 'excepted and reserved' from the 'Representatives'. In particular it was laid down that 'no Representative may in any wise render up, or give or take away, any of the foundations of common right, liberty, and safety, contained in this Agreement . . .' In other words, the agreement constituted a 'paramount law' which the Legislature was not competent to alter or amend; in fact, its function was to be legislative, not constituent. Not even the extreme democrats of Cromwell's army were willing to commit unlimited power to a single legislative Chamber. It may be objected that *The Agreement of the People* was never accepted and never came into force. That is true. But many of its principles reappear in the two written Constitutions of the Commonwealth and Protectorate.

Under the *Instrument of Government*, which was drawn up 16 December 1653, the legislative power was vested in 'the Protector, and the people assembled in Parliament' (§ 1). The twenty-fourth clause specifically provides :

'That all Bills agreed unto by the Parliament shall be presented to the Lord Protector for his consent; and in case he shall not give his consent thereto within twenty days after they shall be presented to him, or give satisfaction to the Parliament within the time limited, that then, upon declaration of the Parliament that the Lord Protector hath not consented nor given satisfaction, such Bills shall pass into and become law although he shall not give his consent thereunto; provided such Bills contain nothing in them contrary to the matters contained in these presents.'

What is the precise meaning of this clause and, in particular, of its concluding words? On this point there is some conflict of opinion between the Constitutional historian and the Constitutional lawyer. Dr. Gardiner contends that the intention was to devise a rigid Constitution, and to limit the authority of Protector and Parliament

by the terms of the Constitution as defined by the *Instrument*. The Protector was, according to this view, invested with a short suspensive veto on ordinary legislation, but neither he nor Parliament, nor both combined, could alter or amend the Constitution itself. It is noticeable that this is not the interpretation placed upon the clause by a contemporary—Colonel Ludlow. His summary of the clause runs as follows: 'That whatsoever they (Parliament) would have enacted should be presented to the Protector for his consent; and that if he did not confirm it within twenty days after it was first tendered to him it should have the force and obligation of a Law; provided that it extended not to lessen the number or pay of the army, to punish any man on account of his conscience, or to make any alteration in the Instrument of Government; in all which a negative was reserved to the single Person' (i. e. the Protector).<sup>1</sup> Ludlow obviously regarded the Protector and Parliament as being conjointly competent to alter even the terms of the Constitution itself, and that was the opinion of Mr. Dicey, than whom there was no higher authority on the legal aspect of the question.<sup>2</sup> It would seem, moreover, to be confirmed by the draft of *The Constitutional Bill of the first Parliament of the Protectorate*, clause 2 of which runs as follows: 'That if any Bill be tendered at any time henceforth to alter the foundation and government of this Commonwealth from a single Person and a Parliament as aforesaid that to such Bills the single Person is hereby declared shall have a negative.' Clearly, if the single Person did not veto the Constitutional amendment, it was to become law. This 'Constitutional Bill' never passed into law, and can be cited, therefore, only in illustration. But so far as it goes it would seem to support the contention of the lawyers that in a legal sense the *Instrument of Government* was not a 'rigid' but a 'flexible' Constitution. On the other hand, the *Instrument* does not provide any machinery for Constitutional

<sup>1</sup> Ludlow, *Memoirs*, p. 478.

<sup>2</sup> Mr. Dicey was kind enough to discuss these points with the author and gave him permission to record the opinion.

amendment, and we know from external sources that Cromwell's own intention was that the Parliament should exercise merely legislative, and not constituent functions;<sup>1</sup> and, further, that in consequence of its determination to debate constitutional questions—'fundamentals'—it was summarily dissolved by the Protector. The point is one of great constitutional significance, but we are here concerned with it only to show that, at one critical period in English history, there was a strong disposition, if not a clear intention, to withdraw from the jurisdiction of an elected legislature, certain matters which were deemed to be of fundamental importance; and, moreover, that the limitation was to be rendered effective by embodying these fundamentals in an *Instrument of Government*.

The fathers of the American Constitution bettered the example of their Puritan ancestors. They were not only careful, as we have seen, to confide to the Legislature strictly limited powers, but they set up a tribunal, competent to decide, in any given case, whether those powers had been exceeded. The legislative power of Congress is therefore very effectively held in check by the Supreme Court, which may, in this sense, be regarded as the 'Guardian of the Constitution'.

The  
United  
States of  
America

Other States have, as indicated in the preceding chapter, adopted various devices to effect the same object; though none have taken greater precautions in this matter than the United States of America, and many have been content with much less elaborate safeguards against constitutional innovation.

Among these States some are Federal, and for these, as I have insisted, a written *Instrument* and a limited legislature are essential; others have been habituated to a written Constitution from infancy. It remains an open question whether it can ever be expedient for a unitary State, which for generations, or it may be centuries, has been accustomed to rely in the conduct of its affairs upon conventions and understandings—unless, of course, it

<sup>1</sup> See speech cited *supra*, p. 128.



proposes to adopt a federal system of government—to place itself under the restraints of a written Constitution.

Joseph de  
Maistre

The great Roman Catholic publicist, Joseph de Maistre, would have answered this question with an emphatic negative: '*Dès qu'on écrit une Constitution elle est morte.*' He held that a Constitution was a divine work, not to be touched with profane hands. The roots of political constitutions exist before laws are reduced to writing; a constitutional law is only and can only be the development or the sanction of a pre-existing unwritten law; that which is most essential, most intrinsically constitutional and really fundamental is never written, nor can it be; the weakness and fragility of a written constitution vary directly as the number of its articles. Such is in brief the basis of his political philosophy. That there is a large substratum of truth contained in these propositions is evident. Even the American Constitution represented, as we have seen, a process of evolution, the origins of which are to be sought in the unwritten Conventions of the English Constitution. Even more conspicuously is this true of the Constitution of the Australian Commonwealth. Moreover, it is true that some of the most fragile of written Constitutions are exceptional in length and in meticulous elaboration. The American Constitution, on the contrary, is a relatively brief and meagre document, conspicuous for its avoidance of detail; and few Constitutions have stood, more triumphantly, the test of experience. On the other hand, De Maistre is evidently in error in his sweeping assertion that the flavour of fundamentals necessarily evaporates in the process of reducing them to writing, though the exceeding difficulty of the task is well exemplified by the case, already cited, of the act for the Reunion of the Canadas in 1840. One of the principal objects of the British legislation was, as we saw, to confer upon the united Canadas 'responsible' government in the English sense, to import into the Canadian Constitution the Cabinet system. But before the task of reducing to the terms of a written Constitution a device so peculiar and

so elusive, the draftsmen of the day evidently quailed ; for not a trace of it appears in the Act.

The jurists who were responsible for the Australian Commonwealth Act were, as we have seen, somewhat more courageous and more successful ; yet it would be a hopeless task to derive from the terms of that Act, taken by themselves and apart from any knowledge of the working of the Cabinet system in England, an adequate or even an intelligible notion of that fundamental feature of parliamentary democracy as evolved in England. To this extent De Maistre would seem to be justified in his cardinal contention.

We must pass, however, to the consideration of a totally different species of safeguard against the unrestricted exercise of power by the Legislative body. I refer to the Referendum or Poll of the People, and to the Popular Initiative.

The Re-  
ferendum

It is important, at the outset, to distinguish clearly between the Referendum and the Initiative, and to note the several forms which both or either of these devices may assume, and the different purposes for which they may be severally employed.

The Referendum may, as we have seen in the case of Switzerland, be either obligatory or optional ; it may in either case be employed in the case of all legislation or only in reference to proposals to alter the Constitution itself ; or it may be invocable only in the event of a deadlock between two legislative Chambers. Similarly the Initiative may apply only to constitutional laws, or to all laws, and may take the form either of a general instruction to the ordinary Legislature to prepare, and to submit to a Poll of the People, a Bill, or of a completely drafted Bill.

Many publicists who strongly favour the acceptance of the principle of a popular veto are not less strongly opposed to the device of the Initiative. Mr. St. Loe Strachey, for example, a lifelong advocate of a Referendum for England, is irreconcilably opposed to the Initiative. 'The Initiative', he writes, 'is an encouragement to crude

The  
Popular  
Initiative

Views of  
Mr. St.  
Loe  
Strachey  
and Lord  
Selborne

legislative schemes. . . . Though it may very well suit a small community like, say, the smallest Canton of Switzerland or one of the least populous American States (it) does not suit a great and complicated modern community with a vast number of laws already on the Statute Book which will have to be brought into harmony with the new proposal. In any case the Initiative is not the Referendum. Therefore, advocates of the Referendum are not called upon in any way to defend the Initiative or to meet arguments which are applicable only to that institution. In my own case the Initiative is anathema, while I regard the Referendum as the most valuable piece of political machinery, and I absolutely refuse to be saddled with one because I want the other.' <sup>1</sup> Similarly, Lord Selborne, another ardent advocate of the Popular Veto, insists that there is no necessary connexion between the Referendum and the Initiative. If there were, he frankly admits that it would constitute a 'new and very serious objection to the adoption of the former'.

Theoretically, Lord Selborne and Mr. Strachey are unquestionably right. In abstract logic there is no connexion between a Veto upon legislation and the initiation of projects of law. It is, moreover, true that some States—the Australian Commonwealth is a conspicuous example—have adopted the one device without the other, and that in other States which have adopted both, recourse to the Referendum is common and the employment of the Initiative is rare. Nevertheless, if the matter be regarded from the standpoint of practical politics in England it would seem to be doubtful whether there is any likelihood of the adoption of the one device without the other.

Nor is the reason far to seek. The Referendum and the Initiative are thus far akin: both are in harmony with the principle of Direct Democracy; neither is theoretically appropriate to the mechanism of Representative Government. Moreover, it will be found in practice that it is the men who are temperamentally if not politically Conserva-

<sup>1</sup> *The Referendum*, pp. 29, 30.

tive who advocate the Referendum and resist the Initiative; while the men of an opposite temper bitterly oppose the former and generally incline to the latter. It is true that socialists and radicals might find it convenient to have recourse to an appeal to the people against legislation carried by a Conservative majority in both Houses of Parliament; but evidently it is as a drag or brake upon rash legislative financial proposals that the Referendum is desired by publicists like Mr. Lecky and Mr. Strachey, and statesmen like Lord Selborne; it is as a goad to stimulate into activity an apathetic or recalcitrant legislature that the Initiative would be and is employed. In this connexion it is significant to note that when the late Lord Balfour introduced into the House of Lords his Bill to provide for the 'Taking of a Poll of the Parliamentary Electors of the United Kingdom with respect to certain Bills in Parliament', it was strongly opposed by Radicals of the type of Lord Loreburn, Lord Sheffield, and Lord Beauchamp, though not exclusively by Radicals. Lord Morley of Blackburn, whose temper was in some respects essentially anti-democratic, vehemently attacked it. 'To set up', he said, 'as the great cardinal and organic standard of Parliamentary life the standard of always consulting and being guided by and thinking of nothing else but what the people desire is to my mind a thoroughly wrong standard.' Men of pro-consular experience, like Lord Cromer, Lord Northcote, a former Governor-General of Australia, and Lord Selborne, sometime High Commissioner of South Africa, warmly supported Lord Balfour's Bill, while Lord Lansdowne favoured the principle of a Referendum, simply as an exceptional expedient 'for the purpose of putting an end to a persistent difference of opinion between the two Houses, and a persistent difference of opinion with regard to important subjects.'

Mr. Ramsay Macdonald, the first Socialist Prime Minister in England, is definitely opposed both to the Referendum and the Initiative. 'Democracy', he writes, 'can only work by representation. Either in the form

Mr.  
Ramsay  
Mac-  
donald

of the mass meeting, or of the Referendum and Initiative' (the conjunction of these is, I submit, significant), 'modern democracy would come to a deadlock. . . . These direct forms of democracy cannot function in such a way as to impose upon the electors responsibility for their decisions.'<sup>1</sup> Mr. Macdonald's repugnance to the Referendum would probably be endorsed by the majority of his followers. But be that as it may, is it not certain that if conservatively-minded politicians were to succeed in engrafting upon the English Constitution the principle of a Referendum there would immediately arise a counter-demand for the Initiative from men of contrary disposition?

Nevertheless, since the Referendum is advocated by a highly responsible body of opinion in this country, while there is as yet no articulate demand, so far as I know, for the Initiative, it is permissible, and in a formal treatise like the present, it is appropriate to consider the Referendum as an accepted device of modern state mechanism, without complicating the discussion by considerations of political expediency or party prepossessions.

The argument for the Referendum

The main argument advanced in favour of the Referendum is that it isolates a particular issue; that it serves to discriminate between legislative projects which involve an amendment of the Constitution and ordinary Bills, and gives to the electorate the opportunity of giving a definite answer 'yes' or 'no' to each specific question. That is true; it is also true that there have been cases where a complication of issues has prevented a straightforward decision on a question of great importance. It may be, for example, that the issue between Free Trade and Protection would have been decided, at least for a generation, in 1906, but for the intrusion in that election of the disturbing and (as regards fiscal policy) the wholly irrelevant controversy about 'Chinese slavery' in South Africa. If, however, this advantage is to be secured, it is essential, as the wisest advocates of the Referendum insist, that the decision should be sought on a specific

<sup>1</sup> *Socialism: Critical and Constructive* (1924), p. 219.

legislative project which has been already submitted to critical examination and discussion at the hands of the Legislature, and should not take the form of an abstract proposition. To ask the electors to express themselves for or against Tariff Reform, for example, or a reform of the Second Chamber, or the Referendum itself, would be both mischievous and futile.

It may, indeed, be objected that that is precisely what happens under the existing Constitutional system at present operative in England. Some recent elections have undoubtedly tended to turn on a single issue, very generally stated, as in 1906 and again in 1923. More often, however, they have taken the form of an *ex-post facto* approval or disapproval of the general policy of a particular Minister or a particular Government. The General Election of 1874, for example, was a clear condemnation of the policy and perhaps the personal statesmanship of Mr. Gladstone; the election of 1880 was quite as plainly a condemnation of Disraeli, and in particular of the policy of his Government in the two preceding years. The Khaki Election of 1900 was a vote of confidence in Lord Salisbury, Mr. Chamberlain, and Lord Milner; that of 1918 a still more distinct vote of confidence in Mr. Lloyd George and his conduct of the war; that of 1922 a condemnation of the Coalition and its works.

The Bill introduced in the House of Lords by Lord Balfour of Burleigh in 1911 was specifically devised to 'Provide for the Taking of a Poll of the Parliamentary Electors of the United Kingdom with Respect to certain Bills in Parliament'. It provided that a Poll of the parliamentary electors should be taken: (a) on the demand of either House of Parliament, in the case of any Bill passed by the House of Commons, but rejected or not passed by the House of Lords within forty days after it was sent up to that House; or (b) on the demand of not less than two hundred members of the House of Commons in the case of a Bill passed by both Houses. In either case the Bill was to be presented for the Royal assent if the

Reference  
to the  
People  
Bill(1911)

total affirmative vote exceeded the negative vote by not less than two votes per centum of the total negative vote. Failing such a majority the Bill was to lapse. The Ballot was to be taken in precisely the same manner as at an election, the only difference being that the elector was to put his cross against 'yes' or 'no' instead of against 'John Jones' or 'William Smith'.

The Bill bears some marks of the troubled constitutional atmosphere in which it was conceived, being mainly, though not exclusively, designed to decide disputes between the two Houses. But it also gave a power of appeal against the decision of both Houses to a strong minority in the House of Commons. Nor was it confined to 'Constitutional' amendments. Therein Lord Balfour of Burleigh and his friends exhibited their prudence, wisely declining the attempt to decide what in England can or cannot be regarded as a 'Constitutional' Bill.

Lord Balfour's Bill, though powerfully supported from the Conservative benches by men of leading like Lord Lansdowne and Lord Selborne, as well as by Lord Cromer, was not accorded a second reading.<sup>1</sup>

The  
doctrine  
of the  
Mandate

A second argument advanced in favour of the Referendum is that it would minimize if not avert the danger of a Government returned to power on one issue using its majority to pass a Bill of great importance, and perhaps highly controversial, on which the electorate had not been consulted. Much of the bitterness exhibited by the 'Passive resistance' movement against the Education Act of 1902 was unquestionably due to this cause. The Non-conformists complained that a majority obtained by an appeal to Khaki sentiment was employed to pass an Education Act conceived primarily in the interests of the Established Church. To enter into the merits of the controversy would be irrelevant; the incident is cited simply to illustrate the particular argument advanced for

<sup>1</sup> The debate on this Bill, *Official Report* (Lords), Fifth Series, vol. vii, pp. 253 seq., and 657-759, contains the best summary known to me of the arguments for and against a Referendum.

the Referendum. It will not, however, escape notice that its acceptance is an implicit admission of the doctrine of the 'mandate', and indicates a decided step towards 'direct' as opposed to representative or parliamentary democracy. But that is a responsibility which must be assumed by all who would introduce the Referendum into the English Constitution.

It is further contended that the device of the Referendum would enable the electorate to give its decision on a particular legislative project without involving a change of Ministry, and would thus tend to 'place the nation above parties or factions', and so would 'greatly diminish the importance of merely personal questions'. The force of the latter part of this plea cannot be denied. The judgement of the Electorate would be more 'detached' and impersonal, though it is impossible to suppose that the personality of the advocates or opponents of the particular Bill could fail to exercise a powerful influence upon the decision.

More disputable, however, is the proposition that the decision could be obtained without affecting the position of the Ministry in power. Theoretically that is true; and the theory is supported by the experience of Switzerland and of the States of the American Union. But the analogy of those countries is wholly false, and the force of the argument derived therefrom is proportionately weakened. It appears to be entirely forgotten by advocates of the Referendum, and to a large extent by their opponents, that neither in Switzerland nor in the United States is Democracy of the parliamentary type; that in neither is the Executive responsible, in the English sense, to the Legislature. The English Parliament is not exclusively, nor perhaps primarily, a legislative machine. The House of Commons is elected not only to pass into law certain legislative projects, but to sustain an Executive which is understood to favour a certain line of administrative policy. To quote once more Seeley's clumsy but impressive phrase: the English Parliament is a Government-

The position of a Parliamentary Executive under a Referendum



making organ. Unless there should occur a complete break with English political tradition, it is hardly conceivable that a Ministry could with self-respect, or indeed with advantage to the country, remain in office after the rejection by the electorate of a Government Bill of first-rate importance. Could Mr. Gladstone, for instance, have retained office in 1886 if his first Home Rule Bill had been rejected by Referendum instead of at a General Election? Did not his party suffer in 1895 by his retention of office after the rejection of the Second Home Rule Bill not by the electorate, but at the hands of the House of Lords? Could Mr. Baldwin have retained office in 1924 if a scheme of Tariff Reform, declared by him to be essential to a solution of the problem of unemployment, had been rejected on a Referendum?

The Par-  
liament  
Act and  
a Refer-  
endum

It is true and relevant that the Parliament Act has deprived the House of Lords of its referendal function, and has to that extent rendered the House of Commons almost omnipotent in a legislative sense. But this practically applies only to Bills proposed by a Ministry in the first or at latest the second session of a newly elected Parliament. If Parliaments, as seems not improbable, became virtually triennial, only Bills introduced in the first session could, if rejected by the House of Lords, become law without reference to the electorate.

Argu-  
ments  
against  
the Re-  
ferendum

That great weight must be attached to the arguments thus summarized is undeniable, but the arguments on the other side are far from negligible. Of these some have been already noticed by inference in preceding paragraphs. Of the rest perhaps the most serious is the contention that the Referendum would tend to weaken, if not to paralyse, the sense of responsibility under which Parliament at present does its work. The knowledge that the ultimate responsibility for any given measure would rest not upon the elected legislators but upon the electors might conceivably have this effect; but on the other it might improve the quality of the debates. The paucity of the space allotted to parliamentary proceedings in the

cheaper newspapers to-day is partly proof, partly perhaps the cause, of the lack of interest taken in those proceedings by the electors. If the electors were conscious that the duty of finally deciding the fate of any given Bill might rest upon them, the effect might well be to quicken their interest in parliamentary debates, and consequently to invest those debates with more importance. It is not easy to predict which of these two contradictory results would ensue. A distinguished writer, English by birth but American by adoption,<sup>1</sup> has been at great pains to disprove the assertion commonly made, that the Referendum is un-English and consequently alien from the genius of English Institutions. He attempts to prove his point by showing that the principle of the Referendum or submission to the people is the 'fundamental basis' of American democracy, that 'after a practice of the principle covering a period of more than 130 years it is found deeply embedded in the written Constitution of almost all the States of the Union', and 'with a growing sentiment in favour of its extension'.<sup>2</sup> More particularly was the device 'native' in New England, where it was adopted by Massachusetts in 1780, by New Hampshire in 1783, by Connecticut in 1818, and by Rhode Island in 1842.

'Un-English'?

The device has also, as we have seen, been adopted in the federal Commonwealth of Australia and in the German Reich.

But is it necessary again to insist that the American Constitutions represent a reaction from, not an imitation of, English Institutions? It was perfectly natural that having thrown off the authority of the British Crown the American colonists should vest sovereignty in the people. Precisely the same tendency was, as already indicated, manifest after the execution of the King and the abolition of the House of Lords in the homeland. So far as the

<sup>1</sup> S. B. Honey, *The Referendum among the English* (Macmillan, 1912). Mr. Honey is (or was) a Judge of the Supreme Court, and writes therefore, with great legal authority.

<sup>2</sup> *Ibid.*, p. 7.

Puritans of New England looked to English models in framing Constitutions for themselves, they looked, quite naturally, to the period of Puritan ascendancy in England, to the period when the Puritan leaders were feeling after a new basis for the Commonwealth which they sought, in vain, to establish. The failure to discover such a basis led first to the autocracy of the 'General' and his army, and later to the restoration of the Monarchy and the authority of the King-in-Parliament. American Institutions have never been 'parliamentary' any more than they have been monarchical. The form of democracy deliberately adopted by them is, as repeatedly argued in these pages, Presidential and Federal, and in genius, therefore, wholly unlike our own, which is essentially Parliamentary and Unitarian. The Referendum may be a sound and valuable device; but the argument in its favour cannot be sustained on the ground that having been adopted in the New England and other States of America, it is therefore essentially English.

The experience of non-sovereign Legislatures, like those of Switzerland and the American States, affords little guidance to those who seek to engraft a device which is wholly consonant with the principle of direct democracy, and evidently appropriate in a federal Constitution, to a polity which is both unitary and parliamentary. That politically, if not logically, the Referendum might lead to the adoption of the Initiative is a danger I have already emphasized; but it seems doubtful whether—as commonly urged—it would substantially contribute to the exaltation of the power of the Executive. If, as is sometimes predicted, Parliament should become a mere debating society, concerned only with formulating the arguments to be submitted to the ultimate authority, the Executive might conceivably increase its power at the expense of the Legislature. But in this connexion it is necessary once again to insist that, even as things are, the primary function of an English Parliament is to sustain or displace the Executive. The vital divisions in

the House of Commons to-day are not those which determine the details of legislation, but those on which depends the fate of the Ministry. This part of the work of Parliament would not be affected by the occasional reference of Bills to the electorate.

When all is said, however, the misgiving persists that while the Referendum is a natural product of conditions which differ widely from those which prevail in England ; that while it has flourished on a soil impregnated with the principles of federalism and direct democracy, and among a people few in numbers but keenly and closely interested in the art of government ; its transplantation to an alien soil might nevertheless be attended with results disappointing if not actually dangerous.

One thing, however, is certain. The adoption of the Referendum would involve, if not a diminution of the responsibility and prestige of the Legislature, at any rate an immense addition to the responsibility of the electorate, and might consequently necessitate important changes in its organization. We must pass, therefore, without delay, to the consideration of various questions connected with that side of the mechanism of the State.



## XVIII. PROBLEM OF THE ELECTORATE

### *Parliamentary Reform.*

'The first element of good government being the virtue and intelligence of the human beings composing the community, the most important point of excellence which any form of government can possess is to promote the virtue and intelligence of the people themselves. . . . The ideally best form of government is that in which the sovereignty or supreme controlling power, in the last resort, is vested in the entire aggregate of the community; every citizen not only having a voice in the exercise of that ultimate sovereignty, but being, at least, occasionally called on to take an actual part in the government, by the personal discharge of some public function, local or general.'—J. S. MILL.

'The best security which human wisdom can devise seems to be the distribution of political authority among different individuals and bodies, with separate interests and separate characters, corresponding to the variety of classes of which civil society is composed—each interested to guard their own order from oppression by the rest, each also interested to prevent any of the others from seizing an exclusive and therefore despotic power; and all having a common interest to co-operate in carrying on the ordinary and necessary administration of government. If there were not an interest to resist each other in extraordinary cases, there would not be liberty: if there were not an interest to co-operate in the ordinary course of affairs, there could be no government.'—SIR JAMES MACKINTOSH.

OF all forms of government, Parliamentary Democracy, particularly as it is understood and worked in the country of its origin, is one of the most delicate and difficult. It depends for success on several conditions. It implies, first, a Legislature scientifically constructed and endowed with adequate powers; secondly, carefully devised methods of legislation, and such rules of procedure as may be appropriate to the functions, be they wide or limited, assigned to the Legislature; thirdly, an Executive strong enough for efficient administration, yet continuously responsible to Parliament, and instinctively responsive to the will of the electorate; but, perhaps above all, it implies a body of electors, individually alert, intelligent,

Essential  
Condi-  
tions of  
Repre-  
sentative  
Demo-  
cracy

and informed, and so organized as faithfully to reflect the will of the whole community.

It is with the last of these conditions that the present chapter is concerned.

The  
Problem  
of the  
Electo-  
rate

In this connexion three questions obtrude themselves : first, what legal or political qualifications should be demanded of the individual elector ; secondly, on what principle the electors so qualified should be grouped in order to express most accurately the views of the aggregate of the citizens—in other words, on what basis seats should be distributed ; and, thirdly, how elections should be conducted and what method of voting should be adopted.

The Prin-  
ciple of  
Locality

Representative institutions in England were, from the first, as already indicated,<sup>1</sup> based primarily upon the principle of locality. Even in Anglo-Saxon days the reeve and four men ' of the better sort ' represented the village or township in the courts of the hundred and the shire. The Normans, or rather the Angevins, developed the idea of central representation. The sheriff of each shire was bidden to send to Westminster, or some other place of meeting, certain knights to represent the shire and burgesses to represent the towns. The principle of locality, as the basis of popular representation, was thus carried on from local to central government.

Traces of  
the Voca-  
tional  
Principle

The principle was not, however, universally applied. The barons, bishops, and abbots were summoned to Parliament as individual landowners. The lower clergy were summoned, on the other hand, primarily as representatives of their order, and with them the Soviet or vocational principle so far and so quickly prevailed over the parliamentary, that they declined to attend, the national council, and preferred to make their fiscal grants to the Crown in their professional assemblies, the Convocations of Canterbury and York.

During the greater part of the fourteenth century it still remained uncertain which of the two principles—that of locality or that of vocation—would ultimately prevail.

<sup>1</sup> Cf. *supra*, c. vii.

The survival of the sheriff and the shire court decided the matter. The knights, as we have seen, and the burghers were alike elected there, and consequently the knights, instead of throwing in their lot with their own social order, preferred the claims of locality to that of class, and united with the burghers to form a Commons House of Parliament. The lawyers and the merchants did, indeed, betray an inclination towards the Soviet principle. But the knights and burgesses, in combination, were too strong for them; the idea of local communities prevailed over that of professional privileges and vocational interests. Not primarily as merchants nor as lawyers, nor as landholders, were the members of the elected House henceforward to sit at Westminster, but as the local representatives of all interests and of every class.

Of some 300 members in the Parliament of 1295, 74 represented counties—two apiece. Durham and Cheshire as palatine counties were not represented, nor was Monmouthshire. The rest represented boroughs; but the borough representation varied greatly from reign to reign, and indeed from Parliament to Parliament. The lowest limit was reached in 1445, when only 99 boroughs made returns. Nor did the issue or return of a writ imply the attendance of the members elected. The attendance varied even more than the nominal representation. Under the Tudors the base of parliamentary representation was greatly widened. When Henry VII ascended the throne the number of elected members was 296; when Elizabeth died it was 462.

The representation of the English counties was completed by the inclusion of Monmouth (1536), the Palatine County of Chester (1543), and that of Durham (1673). Monmouthshire came in as part of a general scheme for the parliamentary representation of Wales. The Act of 1536, which gave two members to Monmouth, gave one to each of the twelve <sup>1</sup> Welsh counties and one to each

County  
and  
Borough  
Representa-  
tion

Creation  
of new  
Constitu-  
encies  
under  
Tudors  
and  
Stuarts

<sup>1</sup> Five out of the twelve being at the same time created out of the Marcher Lordships.



of the chief towns. Henry VIII also gave representation (two members apiece) to the following towns: Calais, Berwick-upon-Tweed, Buckingham, Chester, Lancaster, Newport (Cornwall), Orford, Preston, and Thetford. By the end of his reign the county representation had been increased from 74 to 90, and that of the boroughs to 253, bringing the total membership of the House to 343. Against this increase of numbers no sinister motive could be alleged. The concession of parliamentary representation to Wales did but carry to a logical conclusion the Unionist policy of Edward I; the inclusion of Cheshire and Monmouthshire removed an antiquarian anomaly, while the new Parliamentary boroughs were places of considerable and growing importance.

Of the creation of new boroughs by Edward VI or his Protectors it is impossible to speak with the same confidence. In his short reign no fewer than twenty new constituencies were created. To some of the towns thus enfranchised, such as Westminster, Liverpool, Wigan, Maidstone, Lichfield, and Peterborough, no exception could be taken. But many of the new boroughs were in Cornwall, and although the fishing towns in that county were in the sixteenth century rapidly increasing in importance, it is difficult to resist the conclusion that Cornwall was specially favoured as a royal Duchy, and as being on that account particularly amenable to royal influence. This suspicion is deepened when we find the Protector Northumberland, in issuing letters of instruction to the sheriffs, actually going so far as to indicate the names of the persons whom the Crown wished to be returned. Queen Mary created twenty-one constituencies, three of them single-membered, but Calais, of course, ceased to return representatives, so that the permanent net increase in the membership of the House was nineteen. She also instructed the Sheriffs to admonish the electors to choose 'such as being eligible by order of the laws were of a grave, wise, and catholic sort', but no names were mentioned. Queen Elizabeth exhibited a similar solicitude

as to the personnel of the House of Commons. Thus in 1570 she complained that 'though the greater number of knights, citizens, and burgesses for the most part are duly and orderly chosen, yet in many places such consideration is not usually had herein, as reason would, that is to choose persons able to give good information and advice for the places for which they are nominated, and to treat and consult discreetly upon such matters as are propounded to them'. The Queen, therefore, appointed Archbishop Parker and Lord Cobham to confer with the Sheriff in Kent and to take care that the persons returned 'be well qualified with knowledge, discretion, and modesty'. Queen Elizabeth also was bounteous in the bestowal of parliamentary privileges, no fewer than sixty new members being added during her reign to the House of Commons.

Thus during four Tudor reigns 166 members were added to the House of Commons.

James I gave representation to the Universities of Oxford and Cambridge, and added twenty-three borough members to the House; Charles I eighteen,<sup>1</sup> while Charles II, besides bringing in the County Palatine of Durham, gave members to the city of Durham and the borough of Newark. The total Stuart addition was, therefore, fifty-one, making for the sixteenth and seventeenth centuries a grand total of 217. Apart from the Scotch and Irish Unions there was no further addition to the membership of the House of Commons until 1832, a period of more than a century and a half.

With what object did the Stuart, and still more the Tudor, Sovereigns add so largely to the House of Commons? To this question two answers may be, and have been, given. The older generation of historians, who could see in the Tudors nothing but wilful and overbearing despots, naturally find in this proceeding evidence of an attempt to pack the House of Commons and render it

<sup>1</sup> Many of the boroughs enfranchised under the early Stuarts were, it should be noted, revivals, not new creations.

a pliable instrument in the hands of the Crown. That it was an integral part of Tudor policy to rule in and through Parliament is undeniable; that sinister motives were altogether absent it would be difficult to prove. The special favour shown to Cornwall, even if account be taken of the economic circumstances of the day, is, to say the least, suspicious. On the other hand the Tudors were notoriously anxious both to clip the wings of an over-powerful aristocracy and to counterbalance their political power by encouraging the growth of a strong middle class. The wealth of the commercial classes increased rapidly in the sixteenth century, and nothing was more natural than that the trading and fishing towns from which this wealth was derived should find representation at Westminster. Nor should it escape notice how many of the newly enfranchised towns—Liverpool, Looe, Fowey, Yarmouth (I.W.), Newport and Newtown (I.W.), Minehead, Harwich, Seaford, Corfe Castle, for example—were on the seaboard. Others, like Preston, Wigan, Thetford, Bury St. Edmunds, Peterborough, Cirencester, were towns of growing commercial importance. On the whole, therefore, it is not less consistent with probability and more consistent with charity to assume, with Dr. Prothero, that the main reason for the increase is to be found 'in the growing prosperity of the country and in the reliance which the Tudors placed on the commercial and industrial classes'.<sup>1</sup>

Distribu-  
tion of  
Seats,  
1688-  
1832

The eighteenth century witnessed no similar development. The union with Scotland added to the House of Commons 45 members, of whom 30 represented counties; and the union with Ireland added 100, distributed as follows: counties 64, boroughs 35, with an additional University member for Trinity College. The additions raised the total numbers of the House from 513 to 658, a figure which remained constant until after the Reform Acts of 1884-5. The only change in distribution between 1801 and 1832 was the disfranchisement of Grampound in 1821 and the transference of its two members to the

<sup>1</sup> *Statutes and Documents*, p. lxvi.

County of York. Even that insignificant transaction was denounced by Lord Eldon as calculated to plunge England into 'the whirlpool of democracy'.

Yet, apart from Lord Eldon and his like, few people could deny that reform was by that time overdue. That the efforts of the eighteenth-century reformers should have been vain need not, on that account, excite either surprise or resentment. Their failure is by some attributed to the general political indifference of a period wholly lacking in enthusiasm and idealism. But the true explanation is that not until the close of the century were the anomalies of the existing system revealed. Only very recently, indeed, had the system become really anomalous. It is true that as far back as 1690 John Locke had drawn attention to the absurdity of the system from a philosophical standpoint. But philosophy has never exercised much influence upon practical politics in England. In 1745 Sir Francis Dashwood moved an amendment to the address advocating the reform of Parliament, but nobody listened to his argument, and in 1745 there was no immediate reason why they should. The anomalies in the distribution of seats had not become glaring.

The real genesis of the reform movement may perhaps be traced to the agitation aroused by the treatment accorded to John Wilkes, and still more to his constituents, by Parliament. In order to punish a worthless and unprincipled demagogue, the House of Commons first denied to one of its own members the protection of 'privilege', and then denied to the electors of Middlesex the right of electing the representative of their choice.

This affair raised awkward questions as to the relations between the House of Commons and the Constituencies. Even more fundamental were the questions raised by the agitation aroused in the American Colonies by the passing of the Stamp Act. If there was any validity in the contention that without representation taxation was tyranny, the application of the principle might have begun nearer home. Nevertheless, it is suggestive that

Agitation  
for Parlia-  
mentary  
Reform

The  
Wilkes  
Case

Revolt of  
the  
American  
Colonies

Wilkes's motion for parliamentary reform (1776) should have coincided with the declaration of American independence, although the motion itself excited little attention and was negatived without a division.

The  
Society  
for Pro-  
moting  
Constitu-  
tional In-  
formation

Four years later there was established the Society for Promoting Constitutional Information. The most active promoter of the society was Major John Cartwright, the author of many scores of political tracts and for more than half a century an indefatigable and ardent advocate of parliamentary reform. Among other members of the society were such men as the Duke of Richmond, Richard Brinsley Sheridan, and Dr. Price—famous as the provider of the text on which Burke preached his discourse on the French Revolution. The programme of the society, formulated at a meeting held under the presidency of Charles James Fox, anticipated by more than half a century the Charter of 1838. The points of the two documents were identical: annual Parliaments; universal suffrage; equal electoral districts; the abolition of the property qualification for members of Parliament; payment of members; and vote by ballot. In the same year (1780) a Bill embodying these points was introduced into the House of Lords by the Duke of Richmond, but his speech was interrupted by the tumult roused by the Lord George Gordon riot, and his motion was negatived without a division.

Pitt and  
Reform

Pitt's motion (1782) to consider the state of the representation was, however, rejected only by a majority of twenty, and three years later he had the distinction of introducing the first ministerial scheme for parliamentary reform. Thirty-six rotten boroughs were, with their own consent, to be disfranchised, and their seventy-two members transferred to London and the counties. Their owners were to be compensated at the rate of £7,000 per seat, and the same procedure was to be adopted in the case of other boroughs which might voluntarily apply for disfranchisement. Burke and Fox opposed the principle—afterwards applied in the Act of Union with Ireland—of

recognizing the right of property in boroughs, and the motion was rejected by 248 to 174. Nearly half a century elapsed before a minister tackled the thorny problem again.

The French Revolution served, indeed, to stimulate political agitation but it postponed parliamentary reform. For twenty years the energies of the nation were concentrated, and rightly, on the defeat of Napoleon.

After 1815, however, the flood, pent up for twenty-five years, burst all barriers. It was not only the lapse of time which initiated anew the agitation for reform. Nor was it merely the economic anaemia which invariably follows upon the fever and fret of war. Since the rejection of Pitt's motion in 1785 a new England had come into being: the England of the factory and the forge; of the coal-mine and the iron-field; the centre of the world's shipping, its textile manufactures, its credit and finance. Population which down to and beyond the middle of the eighteenth century had been thin, scattered, and almost wholly rural, not only increased with unprecedented activity, but shifted in distribution. The 5,000,000 people<sup>1</sup> of 1700 more than doubled in the succeeding century and a quarter. Even more remarkable was the change in the distribution of the population as between south and north of the Trent, and as between country and town. To us it is almost incredible that down to the Industrial Revolution the most thickly populated counties (excluding Middlesex and Surrey) should have been, in that order, Gloucester, Somerset, Wilts., Worcester, Northampton, Herts., and Bucks. Sheep-breeding and the spinning and weaving of the wool for the sake of which sheep were bred was still the staple industry of England—a fact which goes far to explain the distribution of parliamentary constituencies.

The situation after 1815

The change when it came was so rapid as to justify the use of the term 'revolution'. Kay, Arkwright, Hargreaves, Compton, Telford, Brindley, Macadam, Watt,

<sup>1</sup> This is the estimate for England and Wales; but before 1801 estimates of population were rough.

and Stevenson made the new England which necessitated a reform of the parliamentary system. Boroughs in southern England which had returned members to Parliament for centuries fell into complete decay; mere villages in the north expanded into great industrial towns.

Distribu-  
tion of  
Seats

Electoral changes had not, however, kept pace with economic development. Of the 203 parliamentary boroughs in 1831 no fewer than 115 were contained in the ten maritime counties between the Wash and the Severn and the county of Wilts., and of the 115 no less than 56 were on the tideway.<sup>1</sup> But this distribution, as Mr. Porritt points out, presents no paradox when the 'social and industrial conditions of England up to the reign of Elizabeth are borne in mind'.<sup>2</sup> Any anomalies which had arisen were of comparatively recent origin. But they were sufficiently glaring. Such places as Old Sarum, Newtown (I.W.), Galton, Bramber, Bossiney, Beeralston, Hedon, Brackley, and Tregony, some of them hardly distinguishable hamlets, returned two members apiece; Manchester, Birmingham, Leeds, Sheffield, Wolverhampton, Halifax, Bolton, and Bradford returned none.

The  
Franchise

The vagaries of the electoral franchise were not less bewildering than those of the distribution of seats. The county members were elected on a uniform franchise by the 40s. freeholders; but in the boroughs the utmost variety prevailed. In some, known as 'Scot and Lot Boroughs', all ratepayers were entitled to vote; in others only the hereditary 'freemen'; in others only members of the municipal corporation; in others 'potwallopers'; while in others the franchise was attached to the ownership or occupation of particular houses known as 'ancient tenements'. But it is noticeable that even in boroughs where the franchise was theoretically wide, it was in practice narrow and confined. Thus in Gatton, where it was enjoyed by all freeholders and 'scot and lot' inhabitants, there were only seven qualified to exercise it, and in Tavistock only ten. In the whole of England, Wales,

<sup>1</sup> Porritt, *Unreformed House of Commons*, p. 90.    <sup>2</sup> *Op. cit.*, p. 85.

Ireland, and Scotland, out of 16 million people there were only 160,000 electors.

It was alleged in 1793 by the Society of the Friends of the People that out of 513 members for England and Wales 70 were returned by boroughs which had practically no electors at all, 90 by boroughs with less than 50, and a further 37 by towns with less than 100 voters apiece. According to another calculation, 254 members were said to represent an aggregate constituency of less than 11,500. Bad in England, things were even worse in Ireland and Scotland. Out of the 300 members in the Irish House of Commons 216 represented boroughs or manors, and of these 200 were elected by 100 individuals and nearly 50 by 10. In Scotland the 66 boroughs contained in the aggregate 1,450 electors; Edinburgh and Glasgow had 33 apiece; while the county of Bute, out of a population of 14,000, possessed 21 electors, of whom only one was resident.

The restriction of the franchise threw enormous power into the hands of the great territorial magnates, of the new 'Nabobs' who employed some of the money which they derived from Indian trade in the acquisition of electoral influence, and, above all, into those of the Government of the day. A narrow franchise contributed also to the almost universal corruption which prevailed in borough constituencies. A vote was a possession too valuable to be parted with except for a high consideration, and it has been estimated<sup>1</sup> that prior to 1832 not more than one-third of the members of the House of Commons represented 'the free choice even of the limited bodies of electors then entrusted with the franchise'. Sydney Smith, writing in 1821, declared that 'the country belongs to the Duke of Rutland, Lord Lonsdale, the Duke of Newcastle, and about twenty other holders of boroughs. They are our masters.' The statement was doubtless exaggerated, but it had in it more than a semblance of truth. The Duke of Norfolk did in fact return eleven

Influence  
and Cor-  
ruption

<sup>1</sup> By Erskine May (*Const. Hist.* i. 362).



members, Lord Lonsdale nine, Lord Darlington seven, and the Duke of Rutland, the Marquis of Buckingham, and Lord Carrington six apiece. In 1780 the Duke of Richmond declared that not more than 6,000 men returned a clear majority of the House of Commons. A petition presented in 1793 on behalf of the Friends of the People by Lord Grey declared that 357 members were returned by 154 patrons, of whom 40 were peers. According to the detailed analysis of Oldfield, no less than 487 out of the 658 members of the House of Commons were in 1816 nominees. Of the English members 218 were returned by the nomination or influence of 87 peers; 137 by 90 powerful commoners; and 16 by the Government itself. Of the 45 Scottish members 31 were returned by 21 peers, the remainder by 14 commoners. In Ireland 51 were returned by 36 peers and 20 by 19 commoners. However much of exaggeration there may be in these various estimates, it is impossible in face of them to maintain that the pre-Reform system was representative in anything but the crudest sense.

Gross corruption alike in the constituencies and among the elected or nominated representatives was the inevitable corollary of such a system. To the sale or purchase of seats the term cannot in fairness be applied. A seat was as much a marketable commodity in the eighteenth century as an advowson in the nineteenth, and the legitimacy of the transaction was, as we have seen, recognized alike in Pitt's Reform Bill of 1785 and in the Act of Union of 1800. In each case the value of a seat was estimated at over £7,000. Nor was this excessive, for sums far in excess of this amount were frequently spent on a parliamentary contest. Thus in 1768 the Bentincks and Lowthers spent £40,000 apiece in contesting the counties of Cumberland and Westmorland; while at York in 1807 the joint expenses of Lord Milton and Mr. Lascelles are said to have amounted to the astounding sum of £200,000.

Such was the electoral system of Great Britain in the

opening years of the nineteenth century. Anachronistic and anomalous it unquestionably was ; but the recognition of anomalies and anachronisms is not in itself sufficient, in England, to stimulate reform. The immediate stimulus was supplied by industrial and agricultural depression, and by the suffering thereby involved to all classes, and particularly to the poor. For the period of transition, designated by historians the 'Industrial Revolution', was accompanied, as such periods invariably are, by terrible distress among the weaker economic classes. The war had diffused, as in uninvaded countries war is apt to diffuse, an air of prosperity, which was partial and temporary if not actually artificial. But the advent of peace brought ruin impartially upon all classes ; landlords, farmers and labourers, bankers, merchants, manufacturers, and artisans—none escaped the common fate. 'Trade', wrote the Master of the Mint, 'is gone, contracts are gone, and there is nothing but stoppage, retrenchments and bankruptcies.' Wellesley-Pole did not exaggerate the gravity of the situation.

Economic distress after 1815

In the soil of industrial depression the political seed sown broadcast quickly produced a rich harvest of agitation. To the philosophical radicalism of the utilitarians ; to the democratic liberalism of Francis Place ; to the communistic teaching of Robert Owen, was added the stimulus of economic distress. Reformers like Lord Grey and Sir Francis Burdett had kept the reform question before the attention of Parliament, but the motions which between 1793 and 1819 they periodically made were invariably rejected. In 1820, however, Lord John Russell won a significant success by carrying through the House of Commons a Bill for the disfranchisement of Grampound, Penrhyn, Camelford, and Barnstaple. The Lords rejected it, but Grampound was disfranchised in 1821 and its members given to Yorkshire. From that time until 1831 the agitation for reform was practically continuous. The general election of 1830 brought to an end sixty years of continuous Tory rule ; the formation of

a Whig Government, pledged to parliamentary reform, was appropriately entrusted to the veteran reformer Lord Grey, and on 1 March 1831 the Great Reform Bill was introduced—not less appropriately—by Lord John Russell.

Parlia-  
mentary  
Reform

The vicissitudes of the parliamentary struggle over this Bill and its immediate successors must not detain us.<sup>1</sup> It must suffice to say that after escaping defeat on the second reading only by a majority of one, the Ministry were defeated on going into Committee and immediately appealed to the country. The Reformers were returned in a large majority; the Bill was reintroduced, almost unaltered, and after prolonged discussions in Committee passed the Commons by a majority of over 100, but was rejected in the Lords. The autumn recess was marked by serious rioting at Bristol, Nottingham, and other towns, and in December a third edition of the Bill, this time with considerable alterations, was introduced, passed quickly through the House of Commons, and was given a second reading by the Lords. But a hostile amendment being carried in Committee, the Ministry requested the King's permission to create new peers. William IV demurred and the Ministry resigned. Neither Lord Lyndhurst, Mannors Sutton, nor the Duke of Wellington could form a Government; Grey and his colleagues were reinstated; Wellington induced the Peers, in order to avert the swamping of their House and their order, to withdraw their opposition, and the Bill passed into law.

The Act  
of 1832

The changes thus effected may now be briefly summarized. First, as regards disfranchisement: 56 boroughs with less than 2,000 inhabitants were totally disfranchised; of these 55 had two members each, one, Higham Ferrers, had one; Weymouth and Melcombe Regis lost two of their four members; and thirty boroughs with less

<sup>1</sup> Full details will be found, e. g. in J. R. M. Butler's *The Passing of the Great Reform Bill*; in G. M. Trevelyan's *Lord Grey of the Reform Bill*; in Spencer Walpole's *History of England since 1815*; and in many other works. I have myself told the story in my *England since Waterloo*, Methuen, seventh edition, 1925, and have here borrowed a few paragraphs from that work.

than 4,000 inhabitants lost one of their two members. Thus 143 seats were surrendered. These were redistributed as follows: 65 to English and Welsh counties; 44 to 22 English boroughs (2 each); 21 to single-member boroughs; 8 to Scotland; and 5 to Ireland. The total numbers therefore remained unchanged at 658. Not less drastic were the changes in the franchise. In the boroughs all the bewildering varieties of qualification were swept away and for them was substituted a uniform £10 household franchise, with the reservation of the rights of resident freemen in corporate towns.<sup>1</sup> In the counties the old 40s. freeholders were reinforced by copyholders and long-leaseholders, and by tenants-at-will paying a rent of £50 a year. In Scotland the county franchise was given to all owners of property of £10 a year, and certain leaseholders; in Ireland to owners as in England, and to £20 occupiers. The final and total result was the addition of some 455,000 electors to the roll—an addition which more than tripled the electorate. In addition to the clauses governing the franchise and the distribution of seats the Act of 1832 provided for the formation of a Register of voters; for the division of constituencies into convenient polling districts, and for the restriction of the polling to two successive days.

On the face of it the Act of 1832 seems, as compared with the subsequent instalments of Reform, almost insignificant. Yet it is proverbially *le premier pas qui compte*; the Act of 1832 was the first great inroad upon the Constitution as it had been worked since the seventeenth century, and it profoundly altered the centre of political gravity. Since 1688 political supremacy had rested with the territorial oligarchy; the great magnates had dominated not only the House of Lords but the House of Commons. Their power was now broken; it passed into the hands of the urban middle classes—the merchants, manufacturers, and shopkeepers. Yet the authors of the Act of 1832 were far from apprehending its real implications.

<sup>1</sup> If existing prior to 1831.

Lord Grey himself represented his proposals as 'aristocratic'; his colleagues hoped that an 'effectual check would be opposed to the restless spirit of innovation';<sup>1</sup> the Whigs generally believed that the Bill was at once 'conservative' and final in its terms. Nothing would have amazed them more than to learn that they were opening the floodgates to the tide of democracy. 'Neither the Whig aristocracy who introduced the first Reform Bill,' says a philosophic writer, 'nor the middle class whose agitation forced it through, conceived it to be even implicitly a revolutionary measure. The power of the Crown and of the House of Lords were to be maintained intact; the House of Commons was to be more representative, but not more democratic than before. The change was regarded as one of detail, not of principle; in no sense a subversion of the Constitution, but merely its adaptation to new conditions.'<sup>2</sup> The Duke of Wellington judged it far more shrewdly: "There is no man who considers what the Government of King, Lords, and Commons is, and the details of the manner in which it is carried on, who must not see that government will become impracticable when the three branches shall be separate, each independent of the other, and uncontrolled in its action by any of the existing influences.' It is true that the full force of the shock administered in 1832 was not felt for at least two generations. Despite organic change, the Government of England continued to be aristocratic in personnel, at least until 1867. Nevertheless, it is a sound instinct which assigns to 1832 the real point of transition from Aristocracy to Democracy. The changes of 1867 and 1884 were implicit in the earlier revolution. That those changes were neither foreseen nor intended by Lord Grey and his colleagues is true, but is nothing to the point. They opened the gates; the capture of the citadel was merely a question of time.

<sup>1</sup> Report of Cabinet Committee.

<sup>2</sup> Dickinson, *The Development of Parliament*, p. 39; the whole essay is eminently worthy of attention.

That an 'extensive measure' could have been much longer deferred few people on either side believed, and events have more than justified the general belief. Reform was inevitable, yet the Act by which it was accomplished was open to grave criticism. That it cruelly disappointed the hopes of the working classes was conclusively proved, firstly, by the Chartist agitation, and secondly by the refusal of the manual workers to support Cobden and Bright in their crusade against the Corn Laws. Their attitude exasperated the middle-class radicals. The Whigs never had any intention of satisfying Chartist aspirations. By declaring the Reform Act to be a 'final' settlement, Lord John Russell not only earned the soubriquet of 'Finality Jack', but estranged the artisans and exhibited his own lack of political foresight.

Nor did the Act satisfy the philosophical radicals. It was based not on principle, but on expediency; it patched and darned; it abolished some flagrant abuses, but left innumerable anomalies; it broke the principle of aristocracy without admitting that of democracy; representation was based neither on numbers, nor wealth, nor education; worst of all, in view of the utilitarian philosophers, it made no effort to secure the representation of minorities. None the less the Whigs had a great achievement to their credit, and if in 1848 the avenging angel of revolution passed us by, we must thank the legislation of 1832 not less than that of 1846.



## XIX. THE ADVENT OF DEMOCRACY (1867-1918)

### *The Representation of Minorities Soviet v. Parliament*

'How to transmit the force of individual opinion and preference into public action. This is the crux of popular institutions.'—ALBERT B. HART.

'I always thought any of the simple unbalanced Governments bad ; simple monarchy, simple aristocracy, simple democracy ; I hold them all imperfect or vicious, all are bad by themselves ; the composition alone is good.'—C. J. FOX (1790).

'The Soviet scheme of government embodies a principle differing fundamentally from the parliamentary system which it has been our habit to regard both as complete and ideal from the constitutional standpoint. So much dissatisfaction is, however, now being manifested towards Parliament that it is not surprising to find even serious-minded people wondering whether some merits are not latent in the Soviet system which might permit of its transfusion—gradual and partial, if not total—into a truly democratic body. Would the Soviet system enable us to reform, if necessary, a representative system which has been outstripped by the requirements of the nation, as well as to correct an obsolescent balance between the centralisation and decentralisation of the administrative functions.'—*Edinburgh Review* (July 1920).

THE floodgates of Democracy, opened in 1832, did not close upon the Act of that year. Grote, the banker-historian, Joseph Hume, Locke-King, and other radicals kept the question of further reform constantly to the fore in the House of Commons. Attempts were made at frequent intervals to introduce voting by ballot, to assimilate the county to the borough franchise, to shorten the duration of parliaments, and to meet in substantial measure other demands of the Chartists. Between 1852 and 1860 no fewer than three Bills for the lowering of the franchise were introduced by Lord John Russell himself, and in 1859 the Derby-Disraeli Government tried its hand at reform ; but without success.

It had, however, become abundantly clear that the settlement of 1832 was not going to be a ' final ' one, and

Reform  
Act of  
1867



in 1867 Disraeli astonished opponents and supporters alike by the boldness of his attempt to 'dish the Whigs'. On the question of Parliamentary Reform they were supposed to have established a monopoly. Disraeli determined to dispute it.

With the personal and parliamentary aspects of the struggle over the Reform Bill of 1867 this chapter cannot concern itself. Only the final result can be registered. As regards the franchise, the Act was a bold and far-reaching measure; as regards redistribution it was relatively insignificant. Taken in conjunction with the Reform Acts for Scotland and Ireland (1868), the net result was that six boroughs returning two members each, and five returning one, were totally disfranchised, and thirty-five other boroughs lost one member each. Thus fifty-two seats were available for redistribution. They were utilized to enfranchise twelve new boroughs, Chelsea and Hackney obtaining two members each, and ten other boroughs one apiece; to give additional members to eight large towns; twenty-seven additional members to counties; two members to the Scottish Universities and one to London University. The total number of the House remained at 658. As for the franchise, household suffrage was established in the boroughs, with the addition of a lodger franchise of £10; the basis of the county franchise was a £12 occupation. This extension of the franchise brought on to the register an addition of 1,080,000 voters, mostly manual workers in the towns. Perhaps the most interesting feature of Disraeli's Reform Act was an innovation in the method of voting. Mr. Hare, J. S. Mill, and others had lately forced to the front the problem of the representation of minorities. The first draft of Disraeli's Bill contained a number of 'fancy franchises': one of these was based upon proved educational attainments; a second upon the possession of funded property; a third on a savings bank deposit. But these 'checks and counterpoises' did not long survive in the rough and tumble of debate. At the last moment,

however, the House of Lords introduced a device for the protection of minorities. In three-member constituencies electors were to be allowed to give only two votes. The House of Commons, despite the strong opposition of Mr. John Bright, preferred the Lords' amendment to the loss of the Bill. The experiment of the restricted vote, though well worthy of a trial, failed to commend itself to the country. It might have fared better had it been tried on a more extended scale. Only thirteen constituencies—seven counties and six boroughs—were immediately affected by it, and in them it did not prove popular. In the seven three-member county constituencies a Liberal invariably obtained the minority seat; and it was the same in Liverpool: the Conservatives, as a rule, won the third seat in Manchester, and occasionally in Leeds and Glasgow. Birmingham, thanks to the organizing genius of Mr. Schnadhorst and Mr. Chamberlain, managed on each occasion to return three Liberals. The 'restricted vote' gave birth to the caucus: but the child survived its parent.

Such were the main features of Disraeli's bold measure. Thomas Carlyle bewailed the 'shooting of Niagara', and denounced the antics of 'the superlative Hebrew conjuror, spell-binding all the great Lords, great parties, great interests of England to his hand, and leading them by the nose like helpless, mesmerized somnambulant cattle to such issue'. Even Lord Derby, Disraeli's own chief, admitted that the Act was 'a leap in the dark', while Mr. Robert Lowe, the leader of the Liberal 'Adullamites', predicted that 'the bag which holds the winds will be untied and we shall be surrounded by a perpetual whirl of change, alteration, innovation, and revolution'. Disraeli himself was quite unmoved by denunciation and by predictions of evil. The Act gave precise expression to his lifelong convictions, and the peroration of his third-reading speech in 1867 echoed the language and reasserted the principles of *Coningsby*. Of an oligarchy, whether of landlords or of merchants, Disraeli had a pro-

found mistrust; like Bolingbroke he desired to see an effective monarchy 'broad based upon the people's will'. His desire and anticipation have been fulfilled.

The Acts  
of 1884  
and 1885

If the Act of 1832 did not secure 'finality', still less did that of 1867. Within five years of its passing an agitation was started for the assimilation of the county to the new borough franchise. A motion in this sense, generally fathered by Sir George Trevelyan, was one of the 'hardy annuals' of the 'seventies. Not, however, until 1884 was the principle embodied in a Government Bill. In February of that year Mr. Gladstone introduced a Bill based upon a uniform household and lodger franchise in counties and boroughs. It passed without serious opposition through the House of Commons; but, on the motion of Lord Cairns, the House of Lords declined to assent to 'a fundamental change in the electoral body' until they had before them the details of the promised scheme for the redistribution of seats. The action of the Lords had logic behind it; but the country resented delay, and a fierce agitation was aroused against the Second Chamber. Still, the House of Lords stood firm, and a deadlock between the two Houses was averted only by the direct and tactful intervention of the Sovereign. A comprehensive scheme of redistribution was presented to Parliament in a specially convened autumn session; and, satisfied as to its general outlines, the Conservative leaders allowed the Franchise Bill to become law in December. Under its terms over 2,000,000 electors—mostly agricultural labourers—were added to the register. The Redistribution Bill itself, the outcome of an agreement between the party leaders on both sides, passed into law in 1885.

In relation to the distribution and organization of constituencies, the Act of 1885 was of considerable significance. It went a long way towards establishing the principle of equal electoral areas. All boroughs with less than 15,000 inhabitants, eighty-one in number, lost their separate representation, and all boroughs with less than

50,000 inhabitants lost one member. For the rest, with the exception of twenty-two boroughs which retained two members apiece, and certain Universities, the whole country, counties and boroughs alike, was divided into single-member constituencies. In order to carry out this scheme it was unfortunately found necessary to increase by twelve the aggregate numbers of the House. The precedent thus set was followed with even more untoward results in 1918. The Act of 1885 set another and a more auspicious precedent: it was virtually an 'agreed' measure; that agreement was reached, as we have seen, through the mediation of the Crown, and Mr. Gladstone had good reason to 'tender his grateful thanks' to the Queen, 'for the wise, gracious and steady influence on her Majesty's part,' which had 'so powerfully contributed to bring about this accommodation and to avert a serious crisis of affairs'.

It was contended and anticipated that the adoption, on a scale almost universal, of the principle of single-member constituencies would, among other advantages, secure adequate representation to minorities. Mr. Gladstone, while declining to introduce the 'novel and artificial system' of Proportional Representation, admitted that a 'large diversity of representation is a capital object in a good electoral system', and he contended that by means of one-member districts the representation of minorities would be adequately secured. This anticipation was not fulfilled. On the contrary, the new system has tended to the exaggeration of majorities. The electoral results prior to and subsequent to the Act of 1885 establish this conclusion. The General Election of 1859 gave the Liberals a majority of 43; that of 1866 a majority of 67; that of 1868 a majority of 128. In 1874 the Conservatives had a majority of 48 over Liberals and Home Rulers combined; in 1880 the Liberals outnumbered Conservatives and Home Rulers by 46.

These figures offer a remarkable and significant contrast to the results obtained since 1886 under the single-

Minority  
Repre-  
sentation

member system. Leaving Ireland out of account, the Unionist majority in 1886 was 183; in 1895 it was 213; in 1900 it was 195; while in 1906 the Radical majority was 289. Did those majorities, so much larger than those which were commonly obtained in the elections immediately preceding the change of system in 1885, accurately reflect the political opinions of the electorate?

The Es-  
sence of  
Liberty

Such a conclusion is stoutly resisted by those who are concerned about the adequate representation of minorities. That concern is shared by political philosophers who have little else in common. Thus Lord Acton, answering his own question as to the real meaning of 'liberty', said: 'I mean the assurance that every man shall be protected in doing what he believes his duty against the influence of authority and majorities, custom and opinion.'<sup>1</sup> And elsewhere: 'The most certain test by which we can judge whether a nation is really free is the amount of security enjoyed by minorities. . . . It is bad to be oppressed by a minority, but it is worse to be oppressed by a majority.' There is a touch of paradox in the last sentence, if divorced from its context. Lord Acton's meaning, evidently, is that there are summary methods of dealing with tyrannical autocrats and oppressive oligarchies which are denied to the victims of overbearing majorities. In his general conclusion Acton was not far from the apostles of a philosophy with which he had little in common—that of the Utilitarians. J. S. Mill himself said: 'Protection against the tyranny of the magistrate is not enough; there needs protection also against the tyranny of the prevailing opinion and feeling.' In Mill's view, therefore, as in Acton's, the protection of minorities would seem to be an inseparable adjunct, if not the essence of 'liberty'. Mill, indeed, goes so far as to affirm that 'it is an essential part of democracy that minorities should be represented. No real democracy, nothing but a false show of democracy, is possible without it.'

<sup>1</sup> *History of Freedom*, p. 3.

How is that representation to be secured? Various expedients have been suggested, and more than one method has been experimentally adopted. Mill strongly favoured the device of plural voting. He would, provisionally at any rate, have given two votes to employers of labour, foremen, highly skilled labourers, bankers, merchants, and manufacturers. Even more cordially did he commend the principle of increased electoral weight to education. 'In any future Reform Bill', he wrote in 1861, 'which lowers greatly the pecuniary conditions of the suffrage, it might be a wise provision to allow all graduates of Universities, all persons who have passed creditably through the higher schools, all members of the liberal professions, and perhaps some others to be registered specifically in those characters and to give them votes as such in any constituency in which they choose to register; retaining, in addition, their votes as simple citizens in the localities in which they reside.'<sup>1</sup> Disraeli, as we have seen, attempted, in the first draft of his Reform Bill of 1867 to give practical effect to Mill's overingenious suggestions, but the 'fancy franchises' were laughed out of court, and Disraeli did not persist in the attempt. The device of plural voting found a place, however, in the Belgian Constitution of 1893.

'Fancy  
Franchises

Another device for securing some representation to minorities is that of the cumulative vote, by which, in constituencies returning three or more members, each elector has a right to as many votes as there are members, and may, at his discretion, either give all his votes to one candidate or may distribute them. The power of accumulation enables a numerically weak party, by the concentration of its voting power on its own candidate, to secure at least one seat against far more powerful opponents. Mr. Lowe advocated the adoption of this device in 1867. His proposal shared the fate of Disraeli's 'fancy franchises'; but the principle was adopted in school-board elections under the Act of 1870, and still remains operative

The Cumulative  
Vote

<sup>1</sup> *Representative Government*, c. viii.

in Scotland, though in England it disappeared with the school-boards themselves in 1902.

In parliamentary elections, however, Great Britain has, thus far, steadily adhered to the 'relative majority' system; a system, that is, under which, in order to secure election, it is not necessary for a candidate to secure more than half the valid votes cast, but only more votes than any other candidate. This method, as was pointed out by the Royal Commission on Electoral Systems,<sup>1</sup> is 'practically confined to English-speaking countries'. All the great European States and most of the smaller ones have rejected or abandoned a system which to them seems 'unscientific', and have adopted one or other of the several expedients designed to soften its asperities and correct its crudities.

The  
Second  
Ballot

Of these the most generally favoured is *The Second Ballot*. Though experience has shown that the interval between the two elections not only 'involves a prolongation of electoral turmoil and disturbance', but 'greatly increases the expense of candidates' and 'offers undesirable temptations to bargaining and intrigue'.

The Alter-  
native  
Vote

Under this system a candidate can be returned at the first election only if he has obtained an absolute majority of the valid votes cast. If no candidate obtains such a majority, a second election is held to decide between the two candidates who in the first election obtained most votes. This method effectively averts the possibility of the election of the least popular of three or more candidates; but it is claimed that the advantages of this system can be obtained more simply and more cheaply by *The Alternative or Contingent Vote*. Where this method prevails voters are invited to indicate the order of their choice by placing the figures 1, 2, 3, &c., against the candidates' names. At the first count only first choices are reckoned. If, on that count, no candidate is found to have obtained an absolute majority, the candidate who is lowest on the poll is eliminated, and his voting

<sup>1</sup> 1910. Cd. 5163.

papers are distributed according to the names, if any, marked 2 on them. If no second choice is indicated, the papers are regarded as exhausted, and the number of exhausted papers is deducted from the total for the purpose of the second count. If there are more than three candidates, and none receives, on the second count, an absolute majority, the process is repeated as often as necessary.

The Royal Commission of 1910 set forth the merits and defects of this system in great detail. Of its defects perhaps the most serious is that while it prevents the election of the worst candidate, it does not necessarily secure the election of the best. Assume a three-cornered contest between *A*, *B*, and *C* in which *A* receives 3,500 first preferences, *B* 3,250, and *C* 3,000. *C* being cut out his second choices are distributed to *A* and *B*, but if the second choices of *A* and *B* had been similarly scrutinized *C* might have been found to have received more first and second choices together than either *A* or *B*. The method is also said to multiply opportunities for party intrigue and the gratification of personal ill-feeling. Nevertheless the Commissioners, after giving all due weight to the objections urged against the system of the *Alternative Vote*, came to the conclusion that it supplies the simplest means of removing the most serious defect inherent in the single-member system, and accordingly recommended its adoption in single-member constituencies.

The Conference on Electoral Reform presided over in 1916-17 by Mr. Speaker Lowther (afterwards Viscount Ullswater) endorsed this recommendation.

The failure of the 'restricted vote' and the single-member constituencies to correct the crudities of the 'relative majority' system has led the advocates of minority representation, in recent times, to concentrate upon the device known as 'Proportional Representation'.

Proportional  
Representation

It was Mr. Thomas Hare who first focussed public attention upon this question; and in his book on *The Machinery of Representation* (1859) he propounded an



ingenious solution of the difficulty. Two years later J. S. Mill published his *Representative Government* (1861), and from that time 'Proportional Representation' has been kept continuously before the attention of political reformers. Mill was a logical and consistent democrat, and his logic compelled him to face the problem of the representation not of majorities only, but of minorities.

'The pure idea of democracy', according to his definition, 'is the government of the whole people by the whole people, equally represented. Democracy as commonly conceived and hitherto practised is the government of the whole people by a mere majority of the people, exclusively represented. The former is synonymous with the equality of all citizens; the latter, strangely confounded with it, is a government of privilege, in favour of the numerical majority, who alone possess practically any voice in the State. . . . In a really equal democracy every or any section would be represented, not disproportionately, but proportionately. A majority of the electors would always have a majority of the representatives; but a minority of the electors would always have a minority of the representatives.'

His reasoning, as we have seen, had some influence upon the authors of the Reform Bill of 1867, and even the authors of the Bill of 1884 paid lip service to the principle, though they rejected the solution preferred by Mill. Lord Eversley, the last survivor of the Cabinet Committee responsible for the details of the Bill of 1884, has put on record the reasons which led them to reject the scheme of the transferable vote, and to favour the division of the country, almost exhaustively, into single-member constituencies. They frankly admitted that the effect of the single-member system would be to exaggerate majorities in excess of the aggregate votes obtained; but contended that this result would strengthen parliamentary government as worked in England. For this reason. Since the Government is dependent from day to day on its majority in the House of Commons, no Government can be 'vigorous and stable' if the representation of the two main parties are divided in mathematical proportion to

the aggregate votes cast for them respectively in the country. Proportional Representation would necessarily lead to small majorities in the House of Commons, and, therefore, to feeble Executives which would be powerless to develop a strong line of policy either in domestic or in foreign affairs. Such a condition of affairs, if recurrent or prolonged, might not improbably lead to a demand for a drastic change in our constitutional machinery, and, in particular, to a divorce of the Executive from the Legislature, and to the direct election of the former for a fixed term of years—in short for the Americanizing of the English Constitution. A further reason against Proportional Representation was found in the excessive expense and labour which the large constituencies, contemplated under that system, would impose upon candidates and members. Finally, it was contended that single-member districts, especially in London, would secure a great variety of members, and an adequate representation of the minority.<sup>1</sup>

The scheme of Proportional Representation involves, it will be observed, not only an alteration in the method of voting, but also a drastic change in the arrangement of constituencies. The advocates of Proportional Representation contend that the present arrangement of single-member constituencies is to a large extent arbitrary and artificial. This system 'turns the body of electors into a disorganized crowd and breaks the unity between local governing groups and Parliament'. Thus wrote Mr. Ramsay Macdonald.<sup>2</sup> Lord Bryce, speaking in the House of Lords on the Representation of the People Bill, in 1918, vigorously attacked the existing system.

'Is it not true', he asked, 'that all communities prosper most and are strongest which are based upon nature and upon history? . . . That was the old system of this country. Our representative system, coming down from the thirteenth century, was based upon taking the natural aggregations of

<sup>1</sup> *Proportional Representation, 1867-1917*, by Lord Eversley (formerly Mr. Shaw-Lefevre), revised edition, Dec. 1917.

<sup>2</sup> *Socialism, Critical and Constructive*, p. 253.

men. Boroughs returned members, counties returned members. Those were the natural areas which had grown up and which represented the associations of the people for social and economic and municipal purposes, and that was the basis of representation. One of the best features of our system was that there was local life in all these places which expressed itself in the choice of representatives in Parliament. Compare that with the system of artificial divisions to which we have resorted. We have taken a large town and cut it up by perfectly artificial boundary lines and created aggregations . . . where I submit it was not necessary, for the purposes of parliamentary representation. Any one who knows Manchester will feel how much better Manchester was when it was one city returning a number of Members, and all of them Members for the one city, and the city interested in those Members, and the city desiring to choose eminent men who were representative of Manchester in one way or another, rather than when it was cut up into divisions.'

That there is considerable force in this contention is undeniable ; but it will not escape notice that the historic areas for which Lord Bryce expressed a strong preference contained under the former franchise very few electors. To-day, a city like Manchester has an electorate approaching 350,000 with no fewer than ten representatives. The West Riding of Yorkshire with nineteen constituencies has over 665,000 voters. Would the restoration of these historic constituencies make for more intimate personal relations between the 350,000 electors of Manchester and their ten representatives in Parliament ? It is not possible to answer that question with a positive affirmative. In smaller boroughs and counties, returning from three to five members apiece, such contact would no doubt be easier.

The Single  
Transfer-  
able Vote

Not less important, however, is the proposed method of voting. Under the proposals of the advocates of Proportional Representation each elector is to have one vote which may be given preferentially, and may be transferred by the returning officer according to the priority of choice indicated by each elector, who would

further be entitled (if he chose) to express as many preferences as there were candidates. Assuming a three-member constituency with nine candidates, each elector might vote only for the man of his choice, or might indicate a priority of choice to the ninth degree. Assuming the votes recorded to be 90,000, every candidate who received a 'quota' of 22,501 votes (i.e.  $\frac{90,000}{4} + 1$ ) would be elected. If on the first count it happened that one candidate received 32,501 votes, 10,000 of his second choices would be available for redistribution among the second preferences indicated by his supporters. The system demands the most scrupulous accuracy and some intelligence on the part of the counters, but on the part of the voters no more of either quality than is involved in 'picking up' a cricket eleven: save that the 'picking' must be all in one process and on paper instead of *viva voce*.

Proportional Representation in one form or another has been adopted in Germany, Austria, Switzerland, Denmark, Sweden, Belgium, Holland, and other European States, in New South Wales and Tasmania, in the Union of South Africa (for the Senate), and for local government purposes in some American and Canadian cities. It was prescribed both to Northern and to Southern Ireland under the *Government of Ireland Act* (1920), and for local government elections under the *Local Government (Ireland) Act* of 1919, and was adopted by Scotland for education authorities in 1918. A determined attempt was made to introduce it into the *Representation of the People Act*, England and Wales, in 1918. But before dealing with that attempt something must be said of other aspects of the Act.

The first point to remark is that the genesis of the Act was peculiar not to say unique. Its provisions represented not the triumph of a party, but the result of an agreement reached at a moment when party conflicts were in abeyance and party lines were blurred. In August 1916 Mr. Asquith, then Prime Minister, threw out the suggestion

The  
'Speaker's  
Conference'

that the party truce should be utilized 'to see if we cannot work out by general agreement some scheme under which, both as regards the electorate and the distribution of electoral power, a Parliament can be created at the end of the war capable of and adequate for discharging' the task of reconstruction. The late Mr. Walter Long (afterwards Viscount Long of Wraxall), representing the Conservative section of the Coalition Ministry, warmly seconded the Prime Minister's proposal, and suggested the setting up of a Conference representative 'not only of parties, but of groups', to work out an agreed scheme. The Speaker of the House of Commons was accordingly invited to call such a conference; he agreed to do so, and he himself presided over it. Some thirty members of both Houses, 'eminently representative of the various shades of political opinion in Parliament and in the country,' were selected by him, and after some months of discussion and deliberation they drafted a scheme of reform which, with singularly few modifications, received the assent of both Houses of Parliament, and was embodied in the Reform Act of 1918.

Franchise  
Reform,  
1918

The Bill, as first presented to the House, dealt not only with the qualification and registration of electors, and with the distribution of seats, but also with the method of voting. Of the proposals under this latter head, one—the Alternative Vote—was, after prolonged discussions, finally rejected; to the fate of the other—Proportional Representation—further reference must presently be made.

As regards the qualification of electors, the provisions of the Act are far more drastic than those of any of its predecessors. Instead of the seven alternative franchises which previously existed, three only are now valid: of these by far the most important is residence; a second is the occupation of business premises; the third is the possession of a degree (or, in the case of women, its equivalent) at a University. The ownership vote disappeared, and with it, except in severely restricted form,

plural voting. Thenceforward a man might have at most two votes—one for his residence, and a second either for a constituency in which he carries on his business or for a University. The University franchise was widely extended, virtually to all who have taken the first degree. By far the most striking innovation in the Bill remains to be noticed. For the first time the franchise was extended to women as well as men; but the basis of qualification for the two sexes differs. A woman is entitled to vote only if she is thirty years of age and is qualified as a 'local government elector'; in other words, is a ratepayer or the occupant of unfurnished lodgings; or is the wife of a man so qualified. Provision was also made for the registration of 'absent voters' and for the casting of their votes either by post or by proxy. Cordially welcomed under the circumstances of the hour, these clauses enabled soldiers, sailors, airmen, and others engaged on work of national importance abroad to record their votes. It was estimated that in all 8,000,000 electors would be added to the registered; in other words that the register would be doubled. This estimate proved to be much below the mark: the total electorate having been increased to about 21,000,000. The enfranchisement was, therefore, on a scale more than four times as large as that of 1884, eight times that of 1867, and more than sixteen times that of 1832. It should be added that one disqualification, that arising from the receipt of poor relief, was partially removed by the Bill, and one disqualification was imposed. There was a general—though not a universal—consensus of opinion that the men who declined on grounds of conscience to take part in the defence of the country should not then, nor in the immediate future, be allowed to have any share in the control of its government. As ultimately adopted, the provision for the exclusion of conscientious objectors was, however, rigidly curtailed both as regards scope and duration. In effect it applied only to the unworthy or the contumacious.

The period of qualification was reduced to six months ; the register has, therefore, to be made up twice instead of once a year, and half the expenses are now paid by the State, half out of local rates.<sup>1</sup> The returning officers' expenses are also defrayed by the State, and all polls are, at a General Election, held on the same day.

It was not, however, around these matters, important as they were, it was not even around the clauses dealing with the franchises, colossal as were the changes involved, that discussion raged most fiercely. It was round the method of voting and the redistribution of seats.

Redis-  
tribution  
of Seats

The principle which was to govern any scheme of redistribution was set forth explicitly in the report of the-Speaker's Conference as follows : ' That each vote recorded shall, as far as possible, command an equal share of representation in the House of Commons.' The standard unit of population for each member was, accordingly, taken at 70,000 in Great Britain, though in Ireland it was to be 43,000. Forty-four old boroughs, including historic cities like Canterbury, Winchester, and Chester, were extinguished, but boroughs with 50,000 or more inhabitants retained their separate representation, and the boroughs as a whole gained, on the balance, 36 members ; the Universities, thanks to the enfranchisement of the new Universities, gained 6 ; and the counties lost 5. Thus the membership of the House was, unfortunately, increased by no fewer than 37 members, bringing up the total number to 707 : a serious addition to a House already unduly large. This total included, however, 105 Irish members. Owing to the refusal of the Sinn Fein representatives to sit in the Imperial Parliament, and the curtailment of Ulster's representation, under the Act of 1920, to thirteen, the last provision never became operative. The subsequent concession (1922) of Dominion status to Southern Ireland, and the consequent exclusion of Southern Irish representatives from the Imperial Parliament, reduced the membership of that Parliament

<sup>1</sup> The *Economy Act* (1926) abolished the second registration.

to 615. The old two-membered constituencies remained undivided, but elsewhere the single-member principle adopted as the basis of the Act of 1885 was carried out in its entirety.

During the later stages of the Bill in the House of Commons, and, still more persistently, in the House of Lords, repeated efforts were made to get the principle of Proportional Representation embodied in the Bill. The House of Lords, indeed, went so far as seriously to endanger the passage of the Bill rather than permit its enactment without such a provision. Ultimately, however, the Commons agreed, in deference to an amendment of the Lords; to delete from the Bill the alternative vote; while on the question of Proportional Representation the Lords covered their retreat by inserting provisions for the appointment of commissioners to frame a scheme for the election of about one hundred members, in accordance with that method, such scheme to take effect only if adopted by resolution of both Houses. As there was no chance whatever that the House of Commons would assent to, still less initiate, such a resolution, the provisions remained inoperative. Thus Proportional Representation found no place in the Act except in the case of Universities returning two or more members. To apply the method to a two-member constituency is not easy, and the attempt has already been attended with inconvenience. The smallest constituency to which the principle can be satisfactorily applied is admittedly a constituency returning not less than three members.

Proportional  
Representation  
rejected

By the passing of the Act of 1918 in the form described in preceding paragraphs, the principle of minority representation suffered a severe rebuff. Despite the unanimous recommendation of the Speaker's Conference, despite the insistence of the House of Lords, the House of Commons refused, by majorities which increased with each trial of strength, to admit the principle of Proportional Representation except in the most narrowly limited degree. Three reasons contributed most powerfully to



this result: the loss of touch between members and constituents involved in the creation of the very large constituencies necessitated by this method of election; the great expense to which candidates would be put; and above all perhaps the difficulty attaching to the conduct of by-elections. Various ingenious devices for meeting the latter difficulties were suggested; but admittedly none was wholly satisfactory.

The advocates of the principle may derive what comfort they can from its application to a large number of local government elections in Europe and America, but thus far Germany is the only great State which has adopted it for the election of a national or federal Legislature.<sup>1</sup> That it is theoretically attractive for the election of a legislative body is undeniable. But the English Parliament, as preceding chapters of this book have, it is hoped, made clear, is much more than a mere Legislature. Its composition determines the complexion of the Executive, if not its personnel; Parliament, throughout its term, sustains the Executive and controls it. This peculiar feature of the parliamentary type of Democracy cannot safely be ignored in considering the relative merits of various electoral systems.

Any electoral method which seems likely to emphasize the tendency to the formation of groups, to endanger the two-party system, will always be regarded with misgiving, if not positive hostility, by those who accept the English type of democracy as sacrosanct.

Is that type, however, destined to endure? Or has representative government reached its zenith? Was the Reform Act of 1918 the last expiring effort to maintain a system hallowed in this country by long tradition—a system which has been periodically adjusted, without serious difficulty or friction, to the ever-changing conditions of modern civilization?

Two questions are, in reality, involved: first, whether the principle of representation can hold its own; and,

<sup>1</sup> Italy adopted it (1919), but has abandoned it.

secondly, whether, if so, representation will continue to be based upon localities, or whether it will take primary account of economic interests and vocational affinities?

The larger issue thus raised between direct and representative Democracy lies outside the scope of the present chapter. The issue between the claims of locality and vocation as the basis of representation is, on the contrary, strictly pertinent to the argument of the preceding paragraphs. More than once indeed it has incidentally intruded itself upon our notice. A few words must therefore be added on this question.

The two principles have, as already indicated, been contending for supremacy ever since the development of central representation. In France and in the Spanish kingdoms the vocational, or as we may term it, the 'Soviet' principle triumphed. The States-General and the Cortes of Castille or Aragon were in fact Soviets *in excelsis*. Down to 1832 the House of Lords was a Soviet of landowners. The Convocations of Canterbury and York enshrine the same principle. In the House of Commons of to-day the only formal recognition of the vocational basis is found in University representation. But the idea, though not formally recognized, has already begun to obtrude itself elsewhere. It would be pedantic to suggest that the official of a trade organization, of an employers' association or a trade union, speaks or votes in the House of Commons primarily as the representative of the locality which he nominally represents. Local areas may, and not infrequently do, coincide with certain dominant industries: a great railway centre, or a mining district, may appropriately be represented by an official of the National Union of Railwaymen, or of the Miners' Federation: but, in fact, such officials are usually selected primarily as representatives of their respective trade unions, and only incidentally assigned as candidates to particular localities. In practice, therefore, the vocational principle is not, even now, unknown in the working of parliamentary institutions in this country.

Vocation  
v.  
Locality

Is it advisable to extend its formal application ?

To this question affirmative answers have lately been given by two representative writers between whose opinions there is, in general, little in common. Mr. Harold Cox writes :

' Our present territorial constituencies have no communal interest of their own in the vast number of problems now coming before Parliament. . . . We have to evolve new forms of government to deal with new problems. If our plans are to be successful they must be based upon the principle of a direct and logical connexion between the purpose aimed at and the character of the agency framed for achieving that purpose. The most urgent of modern-day problems are industrial or commercial ; therefore the basis of the agency or agencies for dealing with them must be industrial or commercial and not territorial. The germ of such an organization may be discovered in contemporary industrial movements.' <sup>1</sup>

The second is from the pen of Mr. G. D. H. Cole :

' Misrepresentation is seen at its worst to-day in that professedly omniscient "representative" body Parliament. . . . Parliament professes to represent all the citizens in all things and therefore, as a rule, represents none of them in anything. It is chosen to deal with everything that may turn up quite irrespective of the fact that the different things that do turn up require different types of persons to deal with them. . . . There can be only one escape from the futility of our present methods of parliamentary government, and that is to find an association and method of representation for each function, and a function for each association and body of representatives. In other words, real democracy is to be found not in a single omniscient representative assembly but in a system of co-ordinated functional representative bodies.' <sup>2</sup>

To these quotations may be added a third from the pen of an anonymous writer :

' The Soviet scheme of government embodies a principle differing fundamentally from the parliamentary system which

<sup>1</sup> *Economic Liberty*, pp. 186-7.

<sup>2</sup> *Social Theory*, p. 207.

it has been our habit to regard both as complete and ideal from the constitutional standpoint. So much dissatisfaction is, however, now being manifested towards Parliament that it is not surprising to find even serious-minded people wondering whether some merits are not latent in the Soviet system which might permit of its transfusion—gradual and partial if not total—into a truly democratic body. Would the Soviet system enable us to reform, if necessary, a representative system which has been outstripped by the requirements of the nation as well as to correct an obsolescent balance between the centralization and decentralization of the administrative functions.’<sup>1</sup>

Whatever degree of importance may be thought to attach to these opinions, it will hardly be denied that they do, to some extent, reflect contemporary thought, and that they closely correspond with a development discernible in other spheres of national activity. Unquestionably there are, in several quarters, indications of a feeling, it may be merely transitory, that the House of Commons despite, or perhaps by reason of, the extension of the electorate, no longer adequately represents the varied interests which go to make up the nation as a whole; that the House of Commons, instead of being the mirror of the nation, is only one of several mirrors. Popular language, however loose and inaccurate, reflects the change. So we read of the ‘Parliament of Industry’, the ‘Parliament of Labour’, the ‘Parliament of Science’, and so forth. That these sectional ‘Parliaments’ should continue to develop each along its own line and each within its appropriate sphere is eminently desirable. Mischief arises only if and when the organ appropriate to one sphere of activity obtrudes upon the sphere of another.

In the political sphere Parliament is and must be supreme; it cannot afford to admit any competing authority or jurisdiction. If the governing bodies of the Colleges of Physicians and Surgeons were to threaten to call out all the doctors because the Government refused to propose to Parliament a measure of total prohibition,

<sup>1</sup> *Edinburgh Review*, No. 473, p. 66.

much more if they declined to evacuate the Sudan, there would be a general outcry against the political use of a professional weapon.

To condemn such an intrusion as impertinent is not, however, to resolve the issue now under consideration. It may be that the Imperial Parliament is attempting too much; that some of its legislative duties might well be devolved upon subordinate law-making bodies; that, in an age of the differentiation of functions, some of the more specialized work now done at Westminster might with advantage be transferred to more specialized organizations: all this is fair matter for argument. Nor is it unreasonable to inquire whether, under the centripetal impulse derived from the development of the means of transport and communication, locality still remains the most logical and most satisfactory basis for representation. The doubt may obtrude itself whether under a system of universal suffrage it is even the safest basis. An acute Belgian philosopher answered this question in the negative a quarter of a century ago.

'Il est incontestable que le suffrage universel sans cadres, sans organisation, sans groupement est un système factice; il ne donne que l'ombre de la vie politique. Il n'atteint pas le seul but vraiment politique que l'on doit avoir en vue, et qui est non de faire voter tout le monde, mais d'arriver à représenter le mieux les intérêts du plus grand nombre. . . . Le suffrage universel moderne c'est surtout le suffrage des passions, des courants irréfléchis, des partis extrêmes. Il ne laisse aucune place aux idées modérées et il écrase les partis modérés. La victoire est aux exaltés. La représentation des intérêts, qui contient les passions par les idées qui modèrent l'ardeur des partis par l'action des facteurs sociaux, donne à la société plus d'équilibre.'<sup>1</sup>

Whether M. Prins would have welcomed the advent of the Soviet when he saw it at closer quarters is a question which may be asked, but cannot be answered.

This, however, must be said: the change from a local to a vocational basis for parliamentary representation

<sup>1</sup> Adolphe Prins, *L'Organisation de la Liberté*, pp. 186, 201.

must come, if it comes at all, as a result of the deliberate decision of the nation. It cannot be accepted at the dictation of any one section of the community, however well organized or influential that section may be. The Soviet principle, properly understood, should not be identified with 'Bolshevism', nor with the 'direct action' which has from time to time been threatened by organized labour. Nor is it inconsistent with the root idea of Representative Democracy. It is an alternative method of representation, which might be combined, as indeed it is in a small degree at present, with the principle of the representation of localities.

Before the present system is abandoned due weight should, however, be given to one consideration. Is it well to accentuate the lines of division between one economic interest and another? Are they not already sufficiently marked? Is it not rather the part of wisdom to insist upon the claims of neighbourhood, upon the fact of common citizenship, as paramount over the interests of social classes or economic groups? If Aristotle was right in maintaining that 'the State is prior to the individual', evidently the citizen is more important than the physician or the lawyer, the grocer or the steelworker. Weaver, miner, baker, teacher—each has his part to play in the Commonwealth, each his contribution to make to the well-being of the community. But it would seem on the whole advisable that all these several economic interests should combine to send to the Imperial Parliament a representative of the locality to which in common they belong, rather than by vocational representation to emphasize their class interests and exaggerate their economic antagonisms.

That 'interests', classes, and vocations will find it increasingly desirable to organize themselves, for sectional purposes, may be assumed as certain. None the less would it be disastrous that the common interest of all, as citizens of the State, should fail to find adequate representation in a Commons House of Parliament.



## XX. PARLIAMENTARY PROCEDURE

### *The Process of Legislation*

'Parliamentary Procedure is often a better index of the true balance of power than the written Constitution.'—J. H. MORGAN.

'This House will receive no petition for any sum relating to public service, or proceed upon any motion for a grant or charge upon the public revenue, whether payable out of the consolidated fund, or out of money to be provided by Parliament, *unless recommended* from the Crown.'—HOUSE OF COMMONS, Standing Order No. 66.

'This House cannot be the effectual guardian of the Revenues of the State unless the whole amount of the taxes and of various other sources of income received for the Public Account be either paid in or accounted for to the Exchequer.'—RESOLUTION OF HOUSE OF COMMONS, 30th May 1848.

'The Appropriation Bill . . . is the keystone of the financial arch.'—HILTON YOUNG.

HARDLY less important than the structure and the powers of the Legislature are the questions relating to its procedure. The problems are indeed interdependent; since it is evident that procedure ought to be appropriate to the functions assigned to the Legislature and that methods of conducting public business must needs vary according to the business which has to be done. We shall, therefore, expect to find considerable varieties of procedure between, for example, the Congress of the United States and the Imperial Parliament: the one being a subordinate body and strictly limited in its legislative and taxative functions; the other being a Sovereign body, unlimited in its legislative powers, and entrusted with functions for transcending in importance those which are performed by a merely legislative assembly. Nor shall we be disappointed.

Proce-  
dure : im-  
portance

Procedure in the Imperial Parliament naturally differs also, though less markedly, from that which has been adopted by or dictated to Legislative Bodies, created by or under a written constitution.

English  
procedure  
largely  
custom-  
ary

'Napoleon, when framing a Constitution for France, saw and expressed clearly the difference between a legislature as



he conceived it should be and the British Parliament as it actually was. He professed the greatest reverence for the legislative power, but legislation, in his view, did not mean finance, criticism of the administration, or ninety-nine out of the hundred things with which in England the Parliament occupies itself. The legislature, according to him, should legislate, should construct grand laws on scientific principles of jurisprudence, but it must respect the independence of the Executive as it desires its own independence to be respected. It must not criticize the Government.<sup>1</sup>

The first and most striking feature of the procedure followed in the English Parliament is that it is in large measure customary—the result not of specific enactment or regulation, but of a long process of historical evolution. Consequently, as Sir Courtenay Ilbert has pointed out, 'the rules of procedure have never been codified. The standing orders do not constitute and were never intended to constitute a code. They merely supplement, explain and alter, in a few particulars, the customary law of the house.'<sup>2</sup> Of the existing standing orders only three date from a period prior to 1832, although the present procedure would seem to have been established in its main principles before the middle of the sixteenth century, if not at an earlier date.

'As late as 1844 there were only fourteen standing orders, and although the number has now (1924) increased to one hundred and three they are largely restrictive in their character or deal with particular matters. Consequently they would afford little help in an attempt to construct a code of procedure. Recourse must, therefore, be had to the precedents to be found in the Journals, the decisions of Speakers and Chairmen, sometimes recorded in the Journals, but more usually to be found in the parliamentary debates, tradition, and the opinions of people experienced in parliamentary proceedings.'<sup>3</sup>

<sup>1</sup> Ilbert, *op. cit.* Redlich, vol. i, pp. vi, vii.

<sup>2</sup> *Parliament*, pp. 131-2, by Sir Courtenay Ilbert, Clerk of the House of Commons, 1902-21, and one of the foremost authorities on parliamentary procedure.

<sup>3</sup> *Parliamentary Procedure and Oversea Assemblies*, reprinted from

From very early days the House of Commons regulated its business with great precision. Thus, there is an order of the 9th of May 1571 that for the rest of the session special afternoon sittings should be held every Monday, Wednesday, and Friday from 3 to 5, the time to be employed only in taking first readings of private Bills. Towards the close of the same reign (1601) there was a formal procedure debate on the important question whether it was for the Speaker or for the House to determine the order in which business should be taken. One member, Mr. Carey, argued that it was the function of the Speaker; 'and if he err or do not his duty fitting to his place we may remove him.' To which Mr. Wisconan, though professing great reverence for Mr. Speaker 'in his place', retorted: 'we know our own grievances better than Mr. Speaker: and therefore every man, *alternis vicibus*, should have those acts called for he conceives most necessary.' Whereupon, according to D'Ewes: 'All said "I, I, I," and Mr. Secretary Cecil urged that, despite the inconvenience thereby caused to the Government, the House should have its way.'<sup>1</sup>

This debate afforded only one of many illustrations of the growing self-confidence of the House of Commons and its individual members. Before the close of the sixteenth century the Speaker was accustomed to demand from the Crown the confirmation of privileges which were already 'ancient and accustomed rights'. These were: the right of access to the Crown, freedom of speech, freedom from arrest, and that 'all their proceedings shall receive from His Majesty the most favourable construction'. Down to 1515 the Speaker asked for freedom of speech and access only on his own behalf. In 1542, however, Speaker Moyle, for the first time, requested freedom of speech for members of the House in general, and in 1554 a demand for the three privileges which have since become customary was made. On the question of freedom of

Privileges  
of the  
House of  
Commons

*The Empire Review*, pp. 3, 4, by Sir T. Lonsdale Webster, Clerk of the House of Commons, 1921—.

<sup>1</sup> D'Ewes, pp. 676-7, *ap. Redlich*.

speech there were frequent debates in the latter part of the sixteenth century; but despite the increasing boldness and independence of the Commons the Queen's concession was grudging and strictly limited:

'Privilege of speech', so ran the Queen's message of the 19th of February 1593, 'is granted, but you must know what privilege you have; not to speak everyone what he listeth, or what cometh in his brain, to utter that; but your privilege is *aye* or *no*. Wherefore, Mr. Speaker, Her Majesty's pleasure is, that if you perceive any idle heads, which will not stick to hazard their own estates, which will meddle with reforming the Church and transforming the Commonwealth, and do exhibit any bills to such purpose, that you receive them not, until they be viewed and considered by those who it is fitter should consider of such things and can better judge of them.' <sup>1</sup>

Farther than this Queen Elizabeth refused to go. So great, however, was the importance attached by the House to questions of privilege that in 1589 a Standing Committee for privileges was appointed. A similar committee was set up in 1593, in 1597, and in 1601, and thereafter the practice became a regular one.

The  
Stuarts  
and Par-  
liament

James I was reminded at the very outset of his reign that the privileges of the House of Commons were 'of right and not of grace only'; and the reminder was, at intervals, repeated. Yet as late as 1621 the King challenged the contention, and when the Commons protested that 'the liberties, franchises, privileges, and jurisdictions of Parliament' were 'the ancient and undoubted birth-right and inheritance of the subjects of England', the King 'with his own hand' rent out the protest from the journal of the House.<sup>2</sup>

Charles I was as stubborn as his father, but the proceedings in the King's Bench against Sir John Eliot, Hollis, and Valentine in 1629 constituted the last attempt on the part of the Crown to impugn in a formal manner, the right of free speech in Parliament.

The Par-  
liaments  
of 1640

In matters of Privilege and Procedure special interest

<sup>1</sup> D'Ewes, *Journal*, p. 460.

*C. J. I.*, p. 668.

attaches to the proceedings of the fourth and fifth Parliaments of Charles I—the Parliaments commonly known respectively as the Short and the Long Parliament. The long interval—eleven years—which had elapsed since the dissolution of the third Parliament together with the incidents connected with the rule of ‘Thorough’ had naturally tended to exacerbate the temper of the newly elected members. The King, or his servants, started badly; the Commons were summoned to the House of Lords to hear the King’s speech not, as was usual and proper, by the Gentleman Usher of the Lords House but by a person who ‘was said to be a Quarter Waiter upon His Majesty’: a discourtesy which ‘was very ill taken, as an undervaluing and dishonouring of the House’. Nevertheless, rather than ‘by any disturbance make the King wait, the Speaker, accompanied with the House, went upon this summons’; evidently, however, with a sense of wounded pride.

On the following Monday (20 April 1640) there was a ‘long and various debate’ upon the circumstances attending the adjournment of the House on the last day of the session of 1629. Ultimately it was resolved that ‘the Speaker’s refusing to put Questions, after a verbal command by his Majesty, signified to this House by the Speaker, to adjourn, and no adjournment made by this House, is a Breach of Privilege of this House’. Moreover, a Select Committee was appointed to prepare a representation to the King, and a petition ‘that the like Violation may not hereafter be brought into Practice to his Prejudice or ours’. Among the members named of that committee were Mr. Pimpe, Mr. Hampden, Sir Jo. Hotham, and others destined to play a conspicuous part in the days to come.

The *Journals* of the Short Parliament and of the early days of the Long Parliament abound with resolutions passed for the purpose of determining their procedure and asserting their independence. Thus, on 21 April, the Commons resolved to ‘prefer grievances to the supply’.

On the 25th the Clerk Assistant was ordered 'not to take any notes here without the precedent order of the House'. On 11 November rules were made in regard to witnesses called before the House or the Committee. In the former case the 'bar ought to be down'; in the latter, otherwise. A few days later Mr. Watkins, a member of the House, having several times disobeyed an order to withdraw was called to the Bar, and 'upon his knees submitted himself to the censure of the House', and was commanded to 'forbear the House'. On 26 November it was ordered that 'neither Book nor Glove shall give any man title to any Place if himself be absent at Prayers', and on the 4th of December that 'whoever does not take his Place, or moves out of it, to the disturbance of the House, shall pay 12*d.* to be divided between the Serjeant and the Poor, and whoever speaks loud &c. the like'.<sup>1</sup>

These may seem trivial matters. Nothing, if properly understood, is really trivial which touches Parliamentary procedure, or affects the position and privileges of its individual members. Not less important, however, is the right of the House to provide for its proper constitution by the issue of writs to fill such vacancies as may occur during the lifetime of a Parliament; by enforcing disqualifications for sitting in Parliament; by the expulsion of members, and by determining disputed returns. The first three of these rights are still exercised by the House, but the fourth, which was claimed under Elizabeth, and continuously exercised, not without inconvenience and embarrassment, from 1604 onwards, was, in 1868, transferred to the Courts of Law. The House also claims and exercises the right to the exclusive cognizance of matters arising within the House, and the consequential power of punishing those who infringe its privileges.

Calling of  
Parlia-  
ment

Before any of these rights can become operative there is, however, a condition precedent: the House itself must be called into being. This can be done only by the King who, on the advice of the Privy Council, issues

<sup>1</sup> *C. J.*, vol. ii.

a Royal Proclamation under the Great Seal. In order to preserve the continuity of Parliament it has become customary for the King to issue one Proclamation 'for Dissolving the present Parliament and Declaring the calling of another', discharging as from a specified day 'the Lords Spiritual and Temporal, and the Knights, Citizens and Burgesses, and the Commissioners for shires and burghs of the House of Commons from their meeting and attendance' and calling a new Parliament. On the same day an Order-in-Council is issued to the Lord Chancellor requiring him to issue writs for the calling of a new Parliament.

These writs are issued in varying forms to Temporal and Spiritual Peers, to the Judges and Law Officers in person, and to the Sheriff or Returning Officer of counties and boroughs. Hereditary Peers are required, before taking their seats in the House of Lords, to present their writs in person at the table of the House; the returns to the writs addressed to Returning Officers are made to the Clerk of the Crown, who furnishes a list of members duly returned to the Clerk of the House of Commons. In the case of by-elections the elected member himself presents a certificate to the Clerk of the House, notifying that the Crown Office's certificate has been duly deposited in the Public Bill Office.

Each new Parliament and every session of Parliament is opened and prorogued by the King in person or by a Commission under the Great Seal. In the case of a new Parliament the opening takes place, in actual practice, in two stages: the formal opening at which the King is invariably represented by Commissioners, and a ceremonial opening at which it is customary for the King and Queen to attend in state. The former is held to enable the House of Commons to choose their Speaker and take the oath of allegiance. At the latter the main business is the reading of the King's Speech. After the first session the earlier stage is naturally omitted.

Meeting  
of Parlia-  
ment

The office of Speaker is generally held to date from the

The  
Speaker

election of Sir Thomas Hungerford in 1376-7. He was the first member to whom that title was given, although; as Bishop Stubbs points out, 'some such officer must have been necessary from the first.' From 1377 onwards the succession has been continuous. The Speaker has always been chosen by the Commons, but their choice must be confirmed by the Crown. Originally the medium of communication between the Commons and the Crown, the Speaker has from the first been the pivot of the parliamentary machine: the principal officer of the House, its representative on all ceremonial occasions, the regulator of its procedure, the guardian of its dignity, the president over its debates. It is therefore a matter of high consequence that the choice should fall upon a fit person. In earlier days it was of special importance to the Crown that the Speaker should be a man well affected to the King and competent to make the Commons walk in the ways desired by him. The Tudors saw to it that he should be such a man, and if we may trust Sir Thomas Smith<sup>1</sup> the customary practice was in their day reversed and the Speaker was 'appointed' by the Crown 'though accepted by the assent of the House'. The actual course of the debates as reported by D'Ewes confirms this view. Clarendon attributes much of the 'growing mischief' of the Long Parliament to the fact that Sir Thomas Gardiner, who had been designated by King Charles for the office of Speaker, failed to secure election owing to the machinations of the Puritans: 'so great a fear there was that a man of entire affections to the King, and of prudence enough to manage those affections, and to regulate the contrary, should be put into the chair.' The exclusion of the King's intended nominee was, says Clarendon, 'an untoward, and in truth an unheard-of accident, which broke many of the King's measures, and infinitely disordered his service beyond a capacity of reparation'.<sup>2</sup> In default of Gardiner the choice fell on William

<sup>1</sup> Sir Thomas Smith, *The Commonwealth of England*, ed. 1589.

Lenthall, who played a conspicuous part in the history of the years that followed, and a part which went far to justify Clarendon's view.

From the seventeenth century onward the Speaker has been at once the servant and the master of the House of Commons.

The manner of his election is on this wise. The Commissioners 'desire' (whereas the King himself 'demands') the attendance of the Commons, and the Commons having obeyed, formally open Parliament in the King's name and bid the Commons choose a Speaker.

Election  
of the  
Speaker

The Speaker-less Commons having returned to their own House, the Clerk of the House points to a particular member, who thereupon rises and proposes as Speaker another member of the House. The motion having been seconded and the House having assented to it,<sup>1</sup> the person so designated submits himself to the pleasure of the House, and, with a display of modest reluctance is half dragged, half conducted, to the chair by his proposer and seconder. Standing on the upper step he then expresses his deep sense of the great honour which the House has been pleased to confer upon him, and having seated himself in the chair receives the congratulations of the spokesmen of various sections of the House.

On the following day the Speaker-elect presents himself at the Bar of the Lords, and submits 'himself with all humility to His Majesty's gracious approbation'. The Lord Chancellor thereupon expresses His Majesty's 'ready approval and confirmation of the choice of his faithful Commons', and the Speaker, having submitted himself with all humility and gratitude to His Majesty's gracious commands, proceeds at once to lay claim to all the rights and privileges of the Commons; and adds:

<sup>1</sup> More than one person may, of course, be proposed and seconded, and a division, thereupon, ensue. The last contest for the speakership took place in 1895, when Mr. William Court Gully, a dark horse 'who knows nothing and whom nobody knows' (as Sir William Harcourt wrote to Lord Rosebery) was elected against Sir M. White Ridley, by 285 votes to 274. Gully made an excellent Speaker. For a graphic account of the incident see Gardiner, *Life of Sir William Harcourt*, ii. 354 seq.



'With regard to myself I humbly pray that if in the discharge of my duties I shall inadvertently fall into any error the blame may be imputed to myself alone, and not to His Majesty's faithful Commons.' The Lord Chancellor thereupon declares that the Commissioners 'have it further in command to inform [Mr. Speaker] that His Majesty doth most readily confirm all the rights and privileges which have ever been granted or conferred upon the Commons by His Majesty or any of His Royal Predecessors' and adds: 'With respect to yourself, sir, although His Majesty is sensible that you stand in no need of such assurance, His Majesty will ever put the most favourable construction upon your words and actions.'

The Speaker then reports these proceedings to the Commons, repeats his thanks, and takes the oath of allegiance. His example is followed by other members, and at last the House is formally constituted.

State  
opening  
of Parlia-  
ment

After some days' interval the Parliament is opened for the dispatch of business, either by Royal Commissioners or by the Sovereign in person. In the latter case the opening is made the occasion of a great State ceremonial carried out amid scenes of medieval pomp and splendour. The stately procession of the King and Queen from their residential Palace to the more ancient Palace of Westminster; the gilded chamber now brilliantly illuminated and thronged with Peers fully robed and Peeresses in court dress; the Bishops in lawn; the Judges in scarlet and ermine; all the high officials of the Court in resplendent costume; the King and Queen in their robes, wearing their crowns and sitting on their thrones; the Commons crowding at the bar—the scene is one which, though it may call forth the mockery of the low-minded, brings to the seeing eye and understanding heart not only a reminiscence of medieval pageantry, but an epitome of seven hundred years of crowded political history.

The  
King's  
Speech

The King, having reviewed the state of international relations, requests the Commons to grant the necessary

supplies, and lays before both Houses what is, in effect, the ministerial programme. The recital ended, the Court withdraws; and each House proceeds separately to consider the speech and to vote an address in reply to it.

Before doing so, each House, in formal assertion of an ancient privilege, reads a Bill, which never goes farther, a first time. Each House is free to adjourn when and for so long as it pleases: but the prorogation of Parliament requires the presence of the Sovereign or his Commissioners. As a fact the King never attends a prorogation: nor does he personally give his assent to Bills. That also is done, in formal manner, by Commissioners, the King's assent being announced, in medieval French, by the Clerk of the Parliaments.

Adjourn-  
ment and  
Proroga-  
tion

The title of this high official recalls the fact that Parliament is still in theory unicameral. All the solemn and formal proceedings take place 'in Parliament', and as a fact in the Upper House, whose principal official is not the Clerk of the House of Lords but 'Clerk of Parliament'. The King does, indeed, formally recognize the separate existence of the House of Commons, and its supremacy in the sphere of finance, by addressing to its members exclusively his request for a grant of supply, but otherwise formal procedure assumes the presence of the Commons in the Parliament Chamber where the Peers habitually sit. To that Chamber the Commons are invariably summoned when formal business—the opening or proroguing of Parliament or the Royal assent to Bills—has to be done.<sup>1</sup>

The Clerk  
of the  
Parlia-  
ments

The preliminaries accomplished, and the address in reply to the King's Speech voted, both Houses can get to business, though, in fact, the business of the House of Lords has to await the completion of certain stages of business in the Commons. With procedure in the House of Commons we may therefore chiefly concern ourselves.

The work of the House resolves itself into three main

<sup>1</sup> This is well brought out in A. F. Pollard's *Evolution of Parliament*, c. vi.

divisions : (1) Deliberation : the discussion of matters of public importance ; (2) Critical : the imposition of a check upon the Executive Government, by interpellation and criticism ; and (3) Legislation : the making of new and the amending of existing statutes.

The last is commonly regarded as the main business of Parliament, and as a fact the performance of the deliberative and critical functions (apart from the regular interpellation of Ministers) is largely incidental to financial legislation.

Legislation The Legislative work of Parliament is threefold : (1) Ordinary Legislation or Public Bills ; (2) Financial Bills ; (3) Private Bills ;—Bills affecting particular localities or interests.

Any member may, if he gets the chance, initiate legislation. Every Session a large number of Bills are introduced by 'private' members, i. e. by members who hold no ministerial office. It is increasingly rare for Bills thus initiated to come to legislative fruition, but the discussion of such projects is far from being invariably wasted. Occasionally the Government adopts as its own the project formulated by a private member ; sometimes it grants him exceptional facilities for passing it into law ; still more often a private member's Bill stifled in infancy in one session, perhaps in many sessions, ultimately finds an honoured place in the Ministerial programme. It would probably be within the mark to say, that of the important legislative enactments of the nineteenth century half made their début in the House of Commons under the aegis of a private member. But the tendency is for the Government more and more to absorb the time of the House, and to demand priority for their own legislative proposals. With the increasing complexity of public business, the ever-widening responsibilities of the House of Commons, and the growing demand for legislation on every conceivable topic, this tendency is irresistible ; but no one can doubt that the extinction of the legislative activity of the private member would result in a deteriora-

tion in the quality, if not the quantity, of Parliamentary enactments. People who hold that the efficiency of the Parliamentary machine is to be judged by the number of 'first-class' measures placed upon the statute-book are naturally impatient of the 'waste of time' involved in the discussion of projects which can rarely hope to ripen into immediate fruition. But this view is in reality short-sighted and erroneous. Of a given Session or even a given Parliament it may be true; the chance of the ballot may operate in favour of the impracticable crank; but a longer view reveals the fact that much of the best legislative work of successive Parliaments had its origin in the 'fads' of private members. From the earlier Factory Acts down to Imperial Penny Postage the annals of Parliament teem with illustrations of this truth.

As regards procedure there is no distinction between a Government Bill and a Private Member's Bill. But sharply to be distinguished from both are *Private Bills*, and to avoid confusion it may be well to deal with the latter before analysing procedure on the former.

A Private Bill is one which is promoted in the interest of some particular locality, persons, or collection of persons. Bills to permit the construction of railways, harbours, tramways, for drainage schemes or the supply of water, gas, or electricity, afford the commonest illustrations. Such Bills originate in Petitions, which must be sent in before a given date (about two months before the commencement of a normal Session), and are then submitted to a quasi-judicial examination at the hands of officials of the House known as Examiners of Petitions for Private Bills. These examiners report that the Standing Orders, of a very stringent character, applicable to such Bills, have or have not been complied with. If everything is in order<sup>1</sup> the Bill is introduced into one or other House—Private Bills being distributed, to facilitate business, fairly evenly between the Houses. The 'pre-

Private  
Bills

<sup>1</sup> The House has power to condone the omission to comply with Standing Orders if it sees fit.

sentation' of a Private Bill is equivalent to the first reading of a Public Bill. On second reading a debate on the general principle may take place, in the relatively few cases where, at this stage, a Private Bill is opposed. If the Bill survives second reading it is referred to a Private Bill Committee, consisting of four members not, locally or otherwise, interested in the Bill. The Committee stage of a Private Bill is in reality a judicial proceeding conducted with the aid of Counsel and sworn witnesses. If the Committee decides that the case has been made for the Bill, or in technical language if the preamble of the Bill is 'proved', the Committee proceeds to examine its clauses in detail, and these having been approved, the Bill is reported to the House, and goes on its further way like an ordinary Public Bill. It should be added that the expense of obtaining a Private Bill is heavy, and that the Exchequer makes a considerable profit out of the fees charged in connexion therewith.

Pro-  
visional  
Orders

Partly to avoid this expense, and partly to secure the goodwill of the Department concerned—generally the Ministry of Health<sup>1</sup> or the Board of Trade—it has become increasingly common for the promoters of the various undertakings which require Parliamentary sanction to proceed by means of *Provisional Order*. A *Provisional Order* is, in effect, an Order issued in pursuance of a statute after searching investigation by a Government Department. These Orders have to be embodied in Provisional Order Confirmation Bills and sanctioned by Parliament, before which they are formally laid by the Department which issues them; but they are rarely opposed and still more rarely rejected. Of the 2,520 Provisional Orders issued by the Local Government Board from 1872 to 1902 only 23 were rejected by Parliament;<sup>2</sup> of 1,206 issued between 1902 and 1924 14 were rejected by Parliament and 12 were withdrawn. This is at once a proof of the confidence reposed by

<sup>1</sup> Formerly the Local Government Board.

<sup>2</sup> Select Committee on Private Business (*Sess. Papers*, 1902, vol. vii, p. 321).

Parliament in the great administrative departments, and also an illustration of the increasingly marked tendency to legislate by delegation. The whole machinery of Private Bill legislation has been subject to much criticism. That it is both clumsy and expensive<sup>1</sup> is undeniable, but on the other hand it has earned the warm encomium of a publicist who is at once exceptionally impartial and exceptionally well informed.

'The curse of most representative bodies at the present day', writes Mr. Lowell, 'is the tendency of the members to urge the interests of their localities or their constituents. It is this more than anything else which has brought legislatures into discredit and has made them appear to be concerned with a tangled skein of private interests rather than with the public welfare. . . . Now the very essence of the English system lies in the fact that it tends to remove private and local Bills from the general field of political discussion and thus helps to rivet the attention of Parliament upon public matters. A Ministry stands or falls upon its general legislative and administrative record, and not because it has offended one member by opposing the demands of a powerful company and another by ignoring the desires of a borough council. Such a condition would not be possible unless Parliament was willing to leave private legislation, in the main, to small impartial Committees and abide by their judgement.'<sup>2</sup>

We may now pass on to explain the procedure of Parliament in the case of Public Bills. These may again be subdivided into (1) ordinary legislation, and (2) Bills of Supply.

Generally speaking, every Public Bill, whether originating in the Upper or Lower House, must in each House pass through five stages: first reading, second reading, Committee, Report, and third reading.

Except in Bills of first-rate importance, the first stage is as a rule purely formal and in certain cases it is omitted altogether. A member, official or private, moves for leave to bring in a Bill; leave is given, and the Bill is then

<sup>1</sup> It was estimated before the war that between £600,000 and £700,000 a year was spent on Private Bill Committees. <sup>2</sup> *Op. cit.* i. 391-2.

brought in and printed. The real debate on the principle of the measure takes place on the motion for the second reading. On a measure of the first magnitude, this stage may be prolonged for days, or even for weeks. If the Bill survives this stage it is 'committed'.

Standing  
Committees

Under a Standing Order of 1907 every Bill, other than a Bill for imposing taxes or a Consolidated Fund or appropriation Bill, or a Bill for confirming provisional orders, stands committed to a Standing Committee, unless the House should, on a definite motion, order it to be committed either to a select committee or to a committee of the whole House. The Standing Committees were originally two in number, but under the Standing Orders of 1907 were increased to four and in 1919 to six. They are nominated by the Committee of Selection, which consists of eleven members, representing all parties, of considerable parliamentary experience. The Committee of Selection is nominated by the House at the commencement of every Session. Each Standing Committee consists normally of from forty to sixty members, but the Committee of Selection may add ten to fifteen members in respect of each Bill committed. One of the committees is appointed for the consideration of all public Bills relating exclusively to Scotland, and consists of all members representing Scottish constituencies with the addition of ten or fifteen members specially nominated *ad hoc* for the consideration of each Bill. In the case of any Bill dealing exclusively with Wales and Monmouth, all members representing those constituencies are entitled to form part of the committee to which the Bill may be committed. The composition of the Standing Committees reflects accurately the composition of the House as a whole; but notwithstanding this fact divisions and discussions in such committees are apt to follow party lines less strictly than in the House.

Committee  
Stage

The Committee stage, whether the Committee be a Committee of the whole House, or a Standing or a Select Committee, affords the appropriate opportunity for dis-

cussion of the clauses in detail, and for amendments thereon. If the Bill is amended at this stage, further detailed discussion and amendment may ensue when it has been reported by the Committee to the House and is considered 'as amended'. After 'Report' comes the third reading, which is a final discussion on principle, and on principle illustrated by details which may or may not have formed part of the Bill when submitted for second reading. When no amendments have been made in Committee of the whole House, the Report stage is omitted, but never when the Bill has been 'sent upstairs', i.e. to a Standing Committee. In certain cases there is a further intermediate stage when a Bill, having passed a second reading, is, before submission to a Standing Committee or Committee of the whole House, sent to a Select Committee.<sup>1</sup>

The Bill having safely passed through all its stages in the originating House has to go through precisely the same stages in the other House. Should the other House amend it,<sup>2</sup> the amendments have to be reconsidered in the originating House. If they are agreed to, the Bill is sent up for the Royal assent; if not, negotiations<sup>3</sup> ensue and one or other House has to give way. If both stand firm the Bill must be dropped.

It remains to notice the procedure in regard to Finance. The granting of supplies to the Crown and the control of expenditure are the primary functions of the House of Commons, and it is important to understand exactly how they are performed.

Financial  
Procedure

During the autumn the several Departments of Government—the War Office, the Admiralty, the Board of Education, and the rest—calculate how much money they will want for the ensuing year, or, in technical language,

Committee of  
Supply

<sup>1</sup> A Select Committee is really a Committee of Inquiry, and may take evidence.

<sup>2</sup> Procedure in the Lords is much more elastic than in the Commons; e. g. amendments may be introduced at any stage.

<sup>3</sup> For precise methods of procedure, whether by 'message' or 'conference', see Erskine May, *op. cit.*, pp. 428 seq. (thirteenth edition, edited by Sir T. Lonsdale Webster, 1924).



'frame their estimates.' These estimates are submitted to and criticized in detail by the Treasury, and having been passed by the Treasury are then approved by the Cabinet. Before 31 March, when the financial year ends, they must be submitted by the responsible Ministers to the House of Commons. For the purpose of considering these estimates the House resolves itself into Committee of Supply—a Committee of the whole House which is differentiated from ordinary sessions only by greater elasticity in the rules of debate, and by the fact that the Chairman of Committees presides in place of the Speaker.

Before the House can go into Committee of Supply the Speaker has to be 'got out of the chair'—a practice founded on the ancient doctrine that the redress of grievances must precede the grant of supplies. Until 1882 it was the rule that whenever Supply was an Order of the Day, and the question was put that 'Mr. Speaker do now leave the chair', any member was at liberty to move any amendment, whether relevant or not, to the particular vote put down for discussion. Since 1882 the motion is made only on the first day on which the House goes into Committee of Supply on the Army, Navy, Air, or Civil Service Estimates, or on a Vote of Credit. On these occasions one amendment may be moved by the member who has secured that privilege by ballot, but it must be relevant to the estimates about to be considered. On other occasions the Speaker leaves the chair without question put. The opportunities for criticism of the Executive are thus seriously curtailed. Not only are the opportunities reduced in number, but criticism may no longer range from China to Peru.

'This system was established in the days of recurring conflict between Parliament and the Crown as a device to secure freedom of discussion on matters of finance. The debates in the House itself were recorded in the *Journal* which was sometimes sent for and examined by the King; and they were conducted in the presence of the Speaker, who in those days was often the nominee and regarded as the

representative of the Sovereign. By going into Committee under the Chairmanship of a member freely selected, the House of Commons secured a greater degree of privacy and independence.' <sup>1</sup>

Another rule, much more ancient and of far wider significance, must here be mentioned. Only the Crown through its Ministers can propose expenditure. Unofficial members may move to reduce a vote, but not to increase one ; least of all to initiate one. This rule, originally and still technically nothing more than a Standing Order of the House of Commons, has now been accepted as a constitutional maxim of almost sacred validity. It is generally regarded as the last effective barrier that remains against the indulgence of philanthropic benevolence at other people's expense. It also relieves pressure upon individual members at the hands of individual constituents. It is always easier for a representative body to spend than to resist expenditure. This salutary rule minimizes, though of course it does not remove, the danger in the case of the greatest of representative assemblies. A Minister must as a rule be convinced of the need for expenditure, not in the heated atmosphere of the House, but in the cool and critical seclusion of his Department. A Minister of the Crown may indeed be induced by the indirect pressure of debate to promise a supplementary Estimate : but it must be proposed on his sole responsibility. A particular group may desire, for example, to double the grant to the unemployed ; the parliamentary method for doing this would be to move a reduction in the salary of the responsible Minister. The protest might eventually prove effective ; but the Standing Order at least provides a guarantee against impulsive generosity due to gusts of collective philanthropy.

The constitutional theory which really underlies the whole of this procedure is thus stated by Erskine May :

' The Crown demands money, the Commons grant it, and the Lords assent to the grant ; but the Commons do not

<sup>1</sup> Report of Select Committee on National Expenditure (121 of 1918).

vote money unless it be required by the Crown ; nor impose or augment taxes unless they be necessary for meeting the supplies which they have voted or are about to vote, and for supplying general deficiencies in the revenue. The Crown has no concern in the nature or distribution of the taxes : but the foundation of all Parliamentary taxation is its necessity for the public service as declared by the Crown through its constitutional advisers.'

To resume the chronological order. Resolutions of Supply, having been carried in Committee and having been translated into ' Ways and Means ' resolutions, are then reported to the House and embodied in a Consolidated Fund Bill or Bills authorizing payment out of the Consolidated Fund. For reasons of financial convenience these Consolidated Fund Bills are passed at intervals during the Session, but the final Consolidated Fund Bill also appropriates the expenditure, previously authorized by resolutions in Committee of Supply, exclusively to the particular objects approved by those resolutions ; it is therefore known as the Appropriation Act.<sup>1</sup> This procedure, it must be observed, applies only to what are technically known as the ' supply ' services—the Army, Navy, and Civil Service. Something less than half the expenditure of the Crown is regulated not by annual but by permanent Acts of Parliament. The Civil List of the Crown itself, the salaries of the judges, pensions, the payment of interest on the National Debt, &c., are charged by permanent Acts upon the Consolidated Fund (of which more hereafter) and do not, therefore, come under the annual review of Parliament.

The same is true of the sources of revenue. Much the greater part of the revenue is raised under the sanction of permanent Acts. Such Acts may, of course, like other Acts, be repealed or amended at the discretion of Parliament ; and frequently are. But they do not call for annual re-enactment. Every year, however, the whole financial system does in effect pass under the review of the

<sup>1</sup> Cf. Appendices D and E.

House of Commons, when it proceeds to discuss how the supply voted to the Crown is to be 'made good'—in other words, how the money is to be found to meet the authorized expenditure.

For the performance of this important function the House resolves itself into a *Committee of Ways and Means*. It is to this Committee that the Chancellor of the Exchequer presents his *Budget* or statement on the national accounts. This statement, which is due as soon as may be after the close of the financial year (31 March), falls into three parts: a review of revenue and expenditure during the year that is ended; a provisional balance-sheet for the year to come; and proposals for remission of existing taxes or imposition of new ones. Although part of the revenue and part of the expenditure is 'permanent', a very large balance of both depends on annual votes, and each financial year is absolutely self-contained. It is the business of the guardian of the national purse to look twelve months ahead, but (in a technical sense) no farther. The national accounts are in fact 'cash' accounts; there is, in the strict commercial sense, no 'balance-sheet'; little, if any, account is taken of assets or of capital investments. The *Budget*, therefore, though nowadays largely concerned with the payment of interest on debt, does not take account of the credit side of the account, and to that extent presents an inadequate, if not misleading, picture of the financial position of the country.

Commit-  
tee of  
Ways and  
Means

The rule that each financial year must be self-contained is enforced by the provision that money voted to a Department but unspent during the current year cannot legally be 'carried forward'. All such casual balances go automatically to the reduction of debt. This rule may, despite the vigilance of the Treasury, occasionally operate in the direction of petty extravagance in the closing weeks of a financial year. No Department likes to confess that it has asked for more than it needs. But appropriation is exceedingly minute; money voted under one

sub-head cannot as a rule be transferred to another, though by the practice of what is technically known as *virement* a certain limited amount of interchange is legally permitted, more particularly in the votes for the fighting services.<sup>1</sup> Petty extravagance is, therefore, more than counterbalanced by large economy, and still more by the supreme advantage of knowing each year precisely how we stand financially. There are critics who maintain that the safeguards are illusory; and it is not given to every layman to be able to unravel the national accounts; but at least it may be said that, thanks to the co-operation of amateur and expert, the national accounts are more intelligible than most. Moreover, though it is true that in all criticism of administrative acts the permanent official is at an immense advantage, it must be remembered that the parliamentary chief of the Treasury is no more permanent than his critics, and that though he can command sources of information denied to them, he enjoys in this respect only a temporary advantage. Tomorrow the tables may be turned; the critic may preside at the Treasury Board, the Chancellor of the Exchequer may be playing the role of critic.

To return to the explanation of Procedure.

In *Committee of Supply* the House determines the amount to be spent on each particular object; in *Committee of Ways and Means* it decides how the money is to be raised. In both cases the 'resolutions' arrived at in Committee have to be 'reported' to the Houses and to be embodied in Bills which, with or without the assent of the Lords, but subject to the assent of the Crown, become law.<sup>2</sup>

Appropriation

How can the House of Commons be sure that its orders have been strictly carried out? This question carries us

<sup>1</sup> On the conditions of *virement*, see Durell, *Parliamentary Grants*, pp. 284 seq.

<sup>2</sup> The Parliament Act of 1911 secured to the House of Commons 'undivided authority' in regard to Finance. It provided that if the Lords withheld for more than one month their assent to a Money Bill as defined by the Act it might be presented to the King, and on his assent become law. To the Speaker is assigned the duty of deciding whether a Bill is, or is not, a Money Bill.

from the region of the Legislature to that of the Executive ; but it may be briefly answered here in order to complete our review of the subject.

The principle of ' appropriation ' was successfully asserted by the Commons under Charles II, but the machinery was inadequate. It was improved at the Revolution, when the produce of specific taxes was assigned to meet specific charges. But this method has obvious disadvantages. The modern system dates from the time of one of the greatest of our financiers—the younger Pitt. In 1787 Pitt established the *Consolidated Fund*. Into this vast financial reservoir flows ' every stream of the public revenue ', and from it issues ' the supply for every public service '.<sup>1</sup> The pivot upon which the whole working of the financial machinery now depends is a functionary known as the Comptroller and Auditor-General. He is a non-political official created by the Exchequer and Audit Act of 1866 ; his independence is secured by the fact that his salary is charged upon the Consolidated Fund, and that he is not permitted to sit in Parliament. The importance attached to the complete detachment and independence of this officer is well illustrated by an incident which occurred in the House of Commons in August 1921. The Government of the day had, in March 1920, raised the salary of the Comptroller and Auditor-General from £2,000 to £3,000 a year, in addition to granting him the ' war bonus ' at that time customary in the case of civil servants. The additional payment thus made was admittedly irregular and illegal. Not, however, until August 1921 did the Government introduce legislation to legalize retrospectively the irregularity. The House of Commons took grave exception to the procedure, and only sanctioned the additional expenditure after an ample admission of error on the part of the Government, and from a generous desire not to penalize a public servant who, having rendered distinguished service to the State, was about to retire on a well-

Exche-  
quer and  
Audit  
Act, 1866

<sup>1</sup> 13th Report of Commissioners of Public Accounts, p. 60.

earned pension.<sup>1</sup> All money collected by the fiscal officials—the Inland Revenue, Customs and Excise, Post Office, and Commissioners of Crown Lands—is paid into the Exchequer account at the Bank of England. Not a penny can be withdrawn from that account without the sanction of this potent individual, the Comptroller and Auditor-General, who presents annually to Parliament an audited account, together with a Report in which it is shown that the sums voted by the House of Commons to the several enumerated purposes have been expended strictly upon them and not otherwise. Before he can do so he must of course satisfy himself that the payments which he has authorized were in accord with the intentions of Parliament, and that they have actually been spent upon the objects to which they were appropriated.

The Report of the Comptroller and Auditor-General is then examined by a Select Committee, known as the Public Accounts Committee, who in due course make their Report to the House of Commons. With the presentation of that Report the circuit of financial procedure is completed. That procedure is necessarily protracted; not until two years after the money has been voted does the House learn that it has been expended in accord with their 'appropriations'; but though protracted, it is, as regards financial purity, entirely effective. How far the procedure is in other respects efficient is a question which must be deferred to another chapter.<sup>2</sup>

<sup>1</sup> House of Commons *Official Report* (5 and 15 August 1921).

<sup>2</sup> Cf. also Appendices D and E, where the financial procedure is described in further detail and is illustrated by documents.

## XXI. PARLIAMENTARY PROCEDURE

### THE POWER OF THE PURSE: PARLIAMENT AND FINANCE

#### *Comparison of English and Foreign Methods*

'It is ultimately to the power of the purse, to its power to bring the whole executive machinery of the country to a standstill, that the House of Commons owes its control over the Executive. That is the fountain and origin of its historical victories over the other organs of the State.'—ERSKINE MAY.

'Finance is not mere arithmetic: finance is a great policy. Without sound finance no sound government is possible; without sound government no sound finance is possible.'—WILSON.

THE origin of Parliament must doubtless be sought in a High Court of Justice. But the administration of justice was, in early days, inextricably intertwined with the collection of revenue—*Iustitia est magnum emolumentum*. The ancient adage enshrined a political truth. Medieval kings would never have summoned to the High Court of Parliament unlearned and unwarlike burgesses had they not needed their financial assistance. Representative institutions owe their origin, therefore, to financial necessities, and the granting of taxes and the control of expenditure is still the primary function of Parliament.

How far does the existing procedure ensure the efficient performance of this function? Does it enable the House of Commons to exercise a real control over public expenditure? Can the taxpayers feel a reasonable assurance that the money taken, by the authority of their representatives in Parliament, out of their pockets, is the minimum amount compatible with the efficient maintenance of the public services, that it is expended with scrupulous honesty and exactness upon the objects to

Justice  
and  
Finance

Is  
existing  
control  
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quate?



which it has been appropriated by Parliament, and that the taxpayers get the fullest value for their money? If these questions evoke a negative or even an ambiguous answer, the further question arises whether it is possible to improve our own methods by the adoption of expedients which have commended themselves to the Parliaments of foreign States?

Audit of  
accounts

The financial procedure of the British Parliament, as it exists to-day, was outlined in the preceding chapter, and of the questions propounded above one can be answered at once. Regarded as a system of audit, as a means of ascertaining that the money voted by Parliament, and appropriated by it in minute detail, has been actually expended upon the objects designated by Parliament, the existing procedure could hardly be improved. The methods employed may to outsiders appear unduly procrastinating; the final report of the Committee on Public Accounts makes admittedly a somewhat tardy appearance; but the circle of control is complete; the House of Commons has the satisfaction of knowing that every farthing of public expenditure is duly accounted for, and that its intentions, as regards the destination of the money which it may have voted to the Crown, have been meticulously fulfilled.

As regards purity of administration, in the narrower sense, the system is above suspicion. Does it, however, enable the House of Commons to restrain wasteful or undesirable expenditure? To this exceedingly important question an answer must now be attempted. An elaborate and relatively recent answer, emanating from a highly expert Committee of the House of Commons, will be found in the Seventh and Ninth Reports of the *Select Committee on National Expenditure* (1918).<sup>1</sup> Two matters

<sup>1</sup> H. C. 95 and 121 of 1918. With these may be usefully compared similar Reports, H. C. 387 of 1902; Report from Select Committee on House of Commons Procedure, H. C. 378 of 1914; *Report of Select Committee on Estimates Procedure*, H. C. 281, 1888; *Report on Public Income and Expenditure*, H. C. 366 I, 1868-9, and Memorandum by the Comptroller and Auditor-General, Cd. 8337 (1916).

evidently demand attention: (i) the form of public accounts and estimates, and (ii) the question of the financial procedure of Parliament.

The form of public accounts is, in truth, a highly technical matter: but technical though it be there is not a business man in the country who would not acknowledge and even insist that a sound method of book-keeping is a primary essential of commercial success. Scientific accountancy is at last coming to its own. 'Costings' are a vital element in modern business procedure, and the Public Departments can no more afford to neglect the precautions which this method of accountancy provides than can any commercial firm. Nor can the House of Commons—and this is the point of immediate importance—begin to enforce economy unless and until the accounts are presented to it in such a form that members can at a glance detect where the wastage, if wastage there be, is taking place.

The existing form of the Estimates as presented to the House of Commons leaves, by general admission, much to be desired. The Select Committee reported in 1918 that Estimates and Accounts prepared on the present basis are of little value for purposes of control either by Departments, the Treasury, or Parliament, and this conclusion was supported by the highest expert opinion. 'I do not think', said Mr. Dannrouther, Accounting Officer of the Ministry of Munitions, 'that Estimates as furnished in the past to Parliament are worth the paper they are written on from the point of view of parliamentary control.' Sir Charles Harris, Assistant Financial Secretary to the War Office, was not less emphatic and was more precise. 'You cannot', he said, 'get any real control of expenditure by cash issues or cash payments, excluding such factors as liabilities, consumption of stores from stock and things of that sort. You cannot control administration by controlling expenses on subjects. If you want to control administration by appropriation you must appropriate to objects.' The evidence given to the

The  
Form of  
Public  
Accounts

Estimates

Committee by the Comptroller and Auditor-General (Sir H. J. Gibson) confirmed that of Sir Charles Harris.

'If', he said, 'you wish to establish financial control it can be better effected by the objective rather than the subjective scheme. I have always felt that the subjective classification, though very simple and convenient, did not lend itself to establishing a unit of cost by which you could control and compare the cost of one service with another.'

Testimony so emphatic in tone and so concurrent in effect, above all so authoritative in source, must be regarded as virtually conclusive; but Sir John Bradbury, at that time Joint Permanent Secretary to the Treasury, supplied in his Memorandum a pertinent reminder. 'In criticizing', he wrote, 'the existing scheme of appropriation of Parliamentary Grants, it must be borne in mind that the control of expenditure in the sense of securing that the various public services are efficiently administered at a reasonable cost, was no part of the object which the framers had in view.' Precisely. All that the House of Commons sought to secure was an effective audit: to make certain that the money voted by Parliament for a particular service had been spent upon that service and upon no other. That object, as we have seen, is already adequately secured.

Growth  
of Expen-  
diture

Is this enough? So long as the Public Departments were few and the expenditure modest; so long as the functions of Government did not go much beyond the securing of the safety of the realm against external enemies and the maintenance of order at home, an effective audit was all that was required. But times have changed. New ministries, with colossal staffs, have sprung up like mushrooms. Moreover, much of the expenditure of the new Departments is of a commercial or semi-commercial rather than an administrative character. If the House of Commons is, as guardian of the public purse, to exercise any efficient control over national expenditure, new methods of accountancy, more nearly in accord with the best commercial practice, are essential.

In a Memorandum prepared for the Select Committee by Sir Gilbert Garnsey and Mr. J. H. Guy, it was stated that

'in ordinary commercial practice the accounts are considered as of vital importance to the business as an index of economical administration and sound management, and a very great deal of attention is given to the system of accounts in use and to the periodical statements submitted to the Directors and to those in charge of various departments of the business affected by the results shown. It is doubtful whether there is any instrument of administration which receives greater consideration in a well-organized business.'

It may indeed be urged that Departments of State ought not to undertake commercial functions and that commercial methods are therefore inappropriate to the public service. Be it so; but the fact, however regrettable, remains that the State appears to be increasingly anxious to undertake duties which according to the older view had better be left to private enterprise and private management. That being so, Parliament, as the Directorial Board responsible to the shareholders, must adopt methods appropriate to the discharge of its new duties.

The House of Commons has not yet done so. 'The Committee found that no vote on account includes the total cost of the service to which it relates.' This sentence points to the root of much of the existing confusion. Appended to the Navy and Army Estimates, and to each vote of the Civil Service and Revenue Departments Estimates, are notes showing that 'provision is made as follows in other Estimates for expenditure in connexion with this service'. For instance: in the votes for the Foreign Office and the Colonial Office (1918), while the sums estimated are £65,547 and £58,626 respectively, the notes above referred to show that for the Foreign Office a further £40,982, and for the Colonial Office a further £20,925, are provided under other votes for expenses of Buildings, Furniture, Fuel and Light, Rates, Stationery and Printing, Pensions, Postal Telegraph and Telephone Services, &c. Again, in the relatively small

vote for the Registrar-General's Office (Scotland) no less than 70 per cent. of what professes to be the vote for the expenses of that office is provided for and accounted for in other votes.

Criticism  
of present  
form of  
accounts

Does this system conduce either to departmental economy or to intelligent criticism and supervision on the part of the House of Commons? Be it admitted that the existing practice does not lack official apologists. It is urged that Parliament already possesses in the notes to the Estimates and in the statements appended to the Reports of the Comptroller and Auditor-General all the information it needs; that inter-departmental payments are objectionable in themselves and involve greater expense; and that by the separation of financial from administrative responsibility control would be loosened. These arguments have considerable weight, but on the whole the rejoinder contained in the Report of the Select Committee seems to be conclusive. Firstly: the 'notes' to the Accounts are purely statistical and in no sense audited accounts; they are not compared with the 'notes' in the Estimates and they are not made by the Departments on whose behalf the expenditure is incurred.

'If (says the Report) the obligation were placed on Departments to take up in their Estimates and Accounts their total expenditure as a matter of accurate accounting, an audit based on this obligation would follow and no account could be certified as correct, which excluded from its expenditure any stores supplied or services rendered for the period it covered. Except in the few cases where Departments compile manufacturing or commercial accounts no department can render an account of its expenditure because no department fully knows it. Its buildings, stationery, rates, pensions, postal, telegraph and telephone expenses are all finally recorded as matters of account in the accounts of the departments administering these services.'

Secondly: the objection to inter-departmental payments, valid though it may have been some years ago, ceases to apply now that receipts arising out of the

working of Departments are to so large an extent appropriated in aid of the votes. In passing, it may be observed that the whole system of appropriations-in-aid is essentially a vicious one, and tends to encourage carelessness and obscure extravagance. So long, however, as it prevails, it vitiates the argument against inter-departmental payments. Finally: why should control be loosened if, apart from the normal control exercised by the Treasury, the supplying Departments continue to obtain repayment of the cost of the services they render from the Departments which are supplied?

At present control is, or ought to be, applied at four points: (1) by the head of the Spending Department, (2) by the Financial Secretary or Accounting Officer, (3) by the Treasury, (4) by Parliament. The best expert opinion would seem, at the moment, to tend towards the conclusion that this control can be most effectually applied *within the Department*, and by a departmental rather than by a Treasury official. On this point, the evidence given to the Committee by Mr. Bonar Law,<sup>1</sup> Mr. Austen Chamberlain,<sup>2</sup> and Mr. McKenna<sup>3</sup> was concurrent and emphatic. 'The actual control', said the last, 'must always lie with the Departments and all that Parliament can do is to inquire whether the Departments have done their work properly.' 'The real control', wrote Mr. Chamberlain, 'is exercised first within each Department by its own officers; secondly by the Treasury, and lastly in case of serious difference of opinion by the Cabinet.' Of the efficiency of Parliament as a check upon expenditure, Mr. Chamberlain has always expressed himself as highly sceptical.

Control of  
Expendi-  
ture

The first thing needful is, however, a revised form of public accounts, such a form as will 'bring to light extravagance and inefficiency and enable criticism to be usefully applied'. With a view to attaining this object the Select Committee made certain specific and detailed

Proposals  
for re-  
vised  
form of  
Public  
Accounts

<sup>1</sup> Chancellor of the Exchequer, 1916-19.

<sup>2</sup> *Ibid.* 1903-6 and 1919-21.

<sup>3</sup> *Ibid.* 1915-16.

recommendations. *Inter alia* they recommended that the estimated expenditure of the year, as shown in the Estimates, and the actual expenditure, as disclosed in the Accounts, should be on a basis of income and expenditure representing the cost of services rendered and of stores, &c., supplied for the service of the year; that the accounts of all Departments should comprise their *total* expenditure, including the services rendered by other Public Departments, the rental value of Government-owned buildings occupied, pensions paid and pension liability; that the Estimates and Accounts should be grouped to show the objects rather than the subjects of expenditure, and with carefully chosen units of cost; that as far as possible there should be one comprehensive series of accounts only for each service of the State; that the accounts presented to Parliament should be responsive to the Parliamentary Estimates of true annual expenditure, and that they should be prepared in such a manner as to provide in all their stages a control, by means of units of cost, of which effective use should be made by comparison of similar units under like conditions both inside the Department concerned and with other Departments of the State.

These recommendations have as yet been adopted only to a very limited extent. The Army Estimates were remodelled in 1919, and it was understood that other Departments, notably the Admiralty, were to follow suit. But reform has so far tarried.<sup>1</sup> Nevertheless the whole question has been explored by a competent Committee; the House of Commons has, for the first time perhaps, been made aware of the dangers to national economy lurking behind the existing forms of Estimates and Accounts, and if it prefers to stand in this matter in the ancient ways—not inappropriate when accounts

<sup>1</sup> And even the War Office has now (1925) reverted, despite much criticism, to the earlier method. But the Government has (1926) agreed to the important recommendations of the Select Committee on Estimates, as to the reclassification of the Estimates. The object of this reclassification is 'to show, as far as possible, the complete functions and expenditure of each Department'. H. C. 59 of 1926.

were relatively simple and expenditure was relatively small—the blame will rest upon itself.

We may now turn from a more or less technical subject to a cognate though distinct aspect of the same problem. So long as the system of departmental accountancy remains as defective as it is at present, departmental economy if effected at all can only be haphazard. But the larger question remains untouched. That question largely turns upon the rules and conventions governing financial procedure in the House of Commons.

The main outlines of the system have been already described; it only remains, therefore, to indicate its shortcomings and to consider certain remedies which have been put forward for its improvement.

The first and most glaring defect is that the so-called Committee of Supply possesses none of the attributes of an effective committee. The rules of debate are, it is true, somewhat more elastic than those which govern procedure in the House itself, but a 'Committee' of 615 members is a contradiction in terms, and even were the time allotted to 'supply' not severely restricted the detailed examination of financial estimates would be impossible. Under the present rules, not more than twenty days, being days before the 5th of August, are allotted for the consideration of the annual estimates for the army, navy, and civil services, including votes on account, to which additional time, not exceeding three days, before or after the 5th of August, may be allotted by order of the House. At ten o'clock on the last day but one of the allotted days the 'guillotine' falls. The Chairman puts forthwith every question to dispose of the vote then under consideration, and then, with respect to each class of the Civil Service Estimates, puts the question that the total amount of the votes outstanding in that class be granted for the services defined in the class. He then deals in like manner with the votes outstanding in the estimates for the army, navy, air force, and revenue departments.

It is hardly necessary to add that under this procedure

Financial  
Proce-  
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days'

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a large proportion of the votes in any given year receive no examination or criticism at the hands of the House of Commons, though it does not follow that a vote on which the 'guillotine' summarily falls may not have been previously discussed.

Commit-  
tee of  
Supply

The 'Committee' lacks, however, not only opportunity and time for criticism, but the information on which to base it. It can neither call for papers nor examine witnesses—sources of information which, as will be seen presently, are freely at the disposal of Budget Committees in foreign Legislatures. There is indeed no pretence of close or effective criticism of details in 'Committee of Supply', with the result that this stage of procedure has come to be commonly utilized for a totally different purpose: the exposure of grievances, and general criticism of the administrative policy of the Government of the day. For this purpose Committee of Supply affords an admirable opportunity, and to this purpose it is mainly devoted.

Treat-  
ment of  
votes in  
Commit-  
tee as  
questions  
of 'Confi-  
dence'

Another formidable obstacle to the detailed discussion of financial estimates demands, at this point, some consideration.

The convention is that if in Committee of Supply a vote is challenged or a reduction moved, such a motion may be treated as one of 'confidence', involving the fate of the Government. Independent action, if not independent criticism, is thereby rendered difficult, and criticism, if not followed by parliamentary action, is apt to degenerate into triviality and to issue in futility. Under these circumstances it is, as the Select Committee pointed out,

'not surprising that there has not been a single instance in the last twenty-five years when the House of Commons by its own direct action has reduced, on financial grounds, any estimate submitted to it. . . . The debates in Committee of Supply are indispensable for the discussion of policy and administration. But so far as the direct effective control of proposals for expenditure is concerned, it would be true to say that if the estimates were never presented and the Com-

mittee of Supply never set up, there would be no noticeable difference.'

The validity of this criticism can be admitted only if special emphasis be laid on the word 'direct'. The indirect influence of the House of Commons is even now considerable, though it might be greatly and advantageously increased. The estimates are framed in the Departments with the knowledge that any item, however detailed, may be challenged in Committee of Supply, and that the responsible Minister must be in a position to defend it. Even more effective in a prophylactic sense is the influence of the Committee on Estimates (to be presently described); every departmental officer in asking for money knows that his demands must run the gauntlet first of departmental scrutiny, then of Treasury scrutiny, and that they may afterwards be challenged in the Cabinet, and even, under exceptional circumstances, in the House itself.

The point as to motions in Committee of Supply being treated as questions of confidence cannot, however, be lightly dismissed. Mr. Lowther (now Viscount Ullswater, then Speaker) expressed doubts whether 'His Majesty's Government have ever considered a reduction made in an estimate as a matter of confidence, unless they sought the opportunity for resigning'; though he had admitted, on an earlier occasion, that governments tend to attach a great deal more importance to defeats on minor points of detail than they were wont to do.<sup>1</sup> Mr. Bonar Law, then Chancellor of the Exchequer, expressed the somewhat cynical view that nothing but the fact that Ministers do regard motions for reduction as questions of confidence prevents the House of Commons from doubling the estimates under the guise of such motions.

That the House of Commons has become in Mr. Lowther's words 'one of the chief spending departments of the State' is a truth which cannot, unfortunately, be

<sup>1</sup> Select Committee on House of Commons Procedure (1914), H. C. 378 (1914), Q. 3061.

gainsaid. All those who are familiar with its recent history are agreed that, instead of criticizing the details of the estimates on the ground of excess, it is now more apt to advocate increases of expenditure. But the imputation, however well justified in itself and effective as a retort, in no sense invalidates the original criticism. Even though the House be predisposed to extravagance it nevertheless remains true that it lacks the power to enforce economy.

Suggested  
Reforms

The question, then, remains : is it possible, by a reform of procedure, to make the control of the House of Commons over public expenditure more of a reality ? Basing their conclusions upon the answers to a *questionnaire*, addressed to the Speaker, to the then Chancellor of the Exchequer and three of his immediate predecessors, to a selected number of members well versed in procedure, and to various officials of the House and other public servants, the Select Committee of 1918 made several important recommendations. The most fundamental was that there should be appointed two, or if need be three, Standing Committees on Estimates. Each Committee was to consist of fifteen members and was to be set up, by the customary procedure, at the beginning of each session. It was to be the duty of these Committees to examine the annual Estimates and such Supplementary Estimates as the conditions allowed, and to suggest to the House any economies, at once possible and desirable, while strictly excluding any question of policy. Decisions on policy must, in a Parliamentary Democracy, be left entirely to the Executive and the Legislature ; they are not for a Standing Committee however competent. On this cardinal point there has been pretty general agreement among English politicians and theorists. To permit a Standing Committee to modify, or even suggest the modification of policy, would, it has been commonly supposed, impinge upon the responsibility alike of the Treasury and of the Cabinet. Nor indeed were the decisions or recommendations of the Committee to have

Esti-  
mates  
Com-  
mittees

any binding effect ; its functions were to be limited to inquiry and report ; in all matters of finance the House of Commons was to remain solely and finally responsible.

It was proposed that the Committee should have the assistance of a permanent officer, whose functions in relation to the Estimates should be parallel with those of the Comptroller and Auditor-General in relation to the Accounts. Such expert assistance was held to be essential to the success of the scheme. For lack of it the Estimates Committees which were set up in the Sessions of 1912, 1913, and 1914 had found themselves greatly hampered in their work, and were in fact able to achieve little. The Committees were to be set up at the earliest practicable date after the beginning of each session, and it was to be their duty, at an early stage of their proceedings, to indicate to the Chairman of Ways and Means the votes or classes, if any, on which they did not intend to report during the current session. The remaining Estimates were to be considered in the order most likely to meet the convenience of the House, and to fit in with the probable course of public business, and Reports were to be made as soon as the consideration of the Estimates for any given Department had been completed. The hope was that the vote put down for consideration on successive supply days would be regulated according to the procedure of the Committees. Those votes would naturally be taken first on which a Committee had already reported, or had intimated its intention not to report during the current session. It would still, of course, remain open to the House to vary the procedure, and to take such votes as would give an opportunity, if desired, to debate some matter of grave and immediate importance. As regards the discussion of grievances and general criticism of administrative policy the House would remain as untrammelled as ever, but in the examination and discussion of financial details there would be a system and order and regularity of procedure which are at present conspicuous by their absence.

How far  
adopted

These recommendations have been adopted only in a very emasculated form. Successive Governments and indeed the House itself have, thus far, shown themselves reluctant to share any substantial portion of their respective responsibilities even with a creature of their own. An Estimates Committee has indeed been set up but only with the following limited terms of reference: 'To examine such of the Estimates as may seem fit to the Committee, and to suggest the form in which the Estimates shall be presented for examination, and to report what, if any, economies, consistent with the policy implied in the Estimates, may be effected therein.' The Committee has, moreover, been set up, as a rule, too late to enable it to do any serious work before Easter; the services of a regular officer, on the lines suggested above, have been denied to it; nor has there been any such co-ordination between the work of the Select Committee and that of the House in Committee of Supply as would focus the discussion in Committee of Supply upon financial details and thus afford a substantial hope of effecting economies in the public services. The hopes aroused in some sanguine minds by the Report of the Committee on National Expenditure have not, therefore, materialized.<sup>1</sup> They have been frustrated partly in the manner indicated above, but most of all perhaps because the Opposition or Oppositions, whose privilege it is to determine the particular votes to be taken on Supply Days, have invariably been influenced in their choice not by considerations of finance, but by the opportunities afforded by the circumstances of the hour for an attack upon the Government. Were there rumours of disaffection in the Police Force or a threatened strike among post office employees, then a vote must be taken involving the salary of the Home Secretary or the Postmaster-General. Is the public mind exercised about a naval base in the Far East? A Naval Vote must be taken—and so forth. The need of exercising

<sup>1</sup> The decision indicated above may, however, mark an important step in advance (see note *supra*, p. 540)

strict control over national expenditure is the last consideration likely to be urged in Committee of Supply.

That consideration is naturally paramount in the Estimates Committee. It is, however, a moot point whether, under the restricted terms of reference, and without the expert assistance for which the Committee has repeatedly but vainly<sup>2</sup> asked, it is worth while to set up that Committee. The work is arduous and detailed, and earns for those who undertake it little gratitude from the House or the constituencies. Yet it has two beneficial effects which should not be underrated. The Committee has the ordinary power to 'send for persons, papers and records', and freely exercises it, calling as witnesses not only the chief permanent officials of the Departments, but, as occasion demands, the Chancellor of the Exchequer or other Cabinet Ministers. Its mere existence, therefore, supplies an additional incentive to economy in the framing of Estimates; its Reports are, as a rule, discussed on the floor of the House, and Ministers are called upon to defend any carelessness or extravagance on the part of subordinates. This is to the good, as far as it goes; but it does not go far enough, and, as things are, the chief value of the Committee is probably educational. It affords to unofficial members of the House an opportunity of becoming intimately acquainted with the methods of the administrative Departments and the minutiae of public finance.<sup>1</sup>

So much for Committees on Estimates. That they might, if provided with appropriate assistance, prove valuable adjuncts to the financial procedure of the House is hardly open to question. But whether it would consort with the genius and traditions of our parliamentary system to invest them with the position and powers

Proce-  
dure in  
Commit-  
tee of  
Supply

<sup>1</sup> On this point the present writer has received much interesting testimony from colleagues on the Estimates Committee. It is perhaps proper to add that he was himself a member of the Select Committee on National Expenditure (1917-18); that he has been (except in one session) a member of all the Committees on Estimates set up since the war, was Chairman of the Committee 1924 and 1925, and has also served on the Committee on Public Accounts.

<sup>2</sup> Until 1926.

accorded to the Budget Committees of certain foreign Parliaments is a point for discussion in subsequent paragraphs. Meanwhile, many of those best qualified to judge hold that an Estimates Committee or Budget Committee must necessarily fail of full effectiveness unless a further change of fundamental importance in the conventional procedure of the House of Commons were simultaneously adopted. Of the convention under which a motion for the reduction of a Vote is treated as a question of confidence, something has been said already. To the detached observer of the working of English institutions it has always appeared paradoxically disproportionate that the fate of Governments should depend upon the result of a division on some minor economy in a departmental estimate. To interpret an adverse verdict on such a point as a censure upon the Government is surely to strain to the breaking-point the theory of a Parliamentary Executive. So long, however, as the existing convention is held sacrosanct, so long as private members are unable to enforce in the division lobby their views on a question of departmental economy, without risking the fall of the Government which they habitually support, and so plunging the country (and themselves) into the turmoil of a General Election, it is plainly inevitable that the smaller issue should be cancelled by the larger, and a decision on the real merits of the question cannot possibly be reached. On this point it is difficult to dissent from the emphatic opinion expressed by the Select Committee of 1918 :

‘ Only when the House of Commons is free not merely in theory and under the terms of the Constitution, but in fact and in custom to vote, when the occasion requires, upon the strict merits of proposed economies uncomplicated by any wider issue, will its control over the national expenditure become a reality.’

The Committee accordingly recommended that  
‘ it should be established as the practice of Parliament that members should vote freely upon motions for reductions made

in pursuance of recommendations of the Estimates Committees, and that the carrying of such a motion against the Government of the day should not be taken to imply that it no longer possessed the confidence of the House.'

This recommendation was cordially endorsed by high authorities, both departmental and parliamentary, but opinion on its merits is not, as we have seen, unanimous ; it would plainly involve a sharp break with constitutional conventions, and it is not, therefore, likely to be adopted save under the pressure of public opinion steadily and insistently applied.

A more technical point, but one hardly less important, is raised in the recommendations of the Select Committee in regard to 'Money Resolutions for Bills'. There is, perhaps, no part of the procedure of the House which calls for more careful revision. Important as is a close scrutiny of the Estimates, no student of recent legislation will deny that scrutiny at least equally close ought to be made of the financial side of ordinary Bills. Take any of the larger items in the programme of social 'reconstruction' and it will be at once apparent that in all these problems the crucial factor is finance. But how much consideration does the House of Commons necessarily give, under the existing system of procedure, to this vital aspect of social legislation ? Standing Order 71 runs as follows :

Money  
Resolu-  
tions for  
Bills

' If any motion be made in the House for any aid, grant, or charge upon the public revenue, whether payable out of the consolidated fund or out of money to be provided by Parliament, or for any charge upon the people, the consideration and debate thereof shall not be presently entered upon, but shall be adjourned to such further day as the House shall think fit to appoint, and then it shall be referred to a Committee of the whole House before any resolution or vote of the House do pass therein.'

The Order is, in terms, sufficiently impressive and would seem to secure due consideration for any motion involving a charge upon public funds. And the rules of procedure implement the Order. If the main object of



a Bill is to impose a charge upon the people, its introduction must be preceded and authorized by a Resolution of a Committee of the whole House, which Resolution must be recommended by the Crown. Such Resolutions are not likely to escape notice, nor to pass without full consideration. Far more insidious is the procedure in relation to Bills in which the creation of a charge upon public funds is, in form, only a subsidiary feature. Such a Bill may be introduced in the ordinary way, and it is sufficient if the requisite Resolution is agreed to by the House before the clause to which it relates is reached by the Committee on the Bill. Clauses requiring such Resolutions are printed in italics, and are not supposed to form part of the Bill as introduced. It may sometimes be a moot point whether the charge upon public funds is the *main object* of a Bill or merely a *subsidiary feature* of it. The point was in fact raised in 1919 in connexion with the *Imports and Exports Regulation* ('Anti-Dumping') Bill. Mr. Speaker Lowther was asked to rule the Bill out of order on the ground that being a Bill to impose taxes it ought to have originated in Committee of Ways and Means. He declined, however, to do so because, in his view, 'the main purpose of the Bill was to exclude dumped goods and goods competing with key industries and the imposition of charges in the nature of Import Duties' was merely incidental to the adoption of such a policy. Nevertheless, since the Bill would impose fines upon importation, Resolutions would be required in Committee of Ways and Means before the financial clauses could be taken in Committee of the House. The point is a subtle one, and difference of opinion may legitimately exist as to the accuracy of the ruling. Be that as it may, the incident pertinently illustrates the existing rules of procedure.

A more substantial question remains: does the existing procedure afford adequate safeguards against extravagant and ill-considered expenditure? No one who is acquainted with the conduct of business in the House of Commons

can answer this question in the affirmative. Money Resolutions on Bills of the widest scope, and calculated to involve huge expenditure, are taken after eleven o'clock, or at other odd moments after the close of the main business of the sitting ; they pass often without explanation and commonly without discussion. Unless private members happen to be unusually alert they may be passed quite unnoticed, and the country may wake up any morning to find itself committed to large expenditure, while the guardians of the public purse were absent or asleep.

Thanks to the recommendations made by the Select Committee of 1918 some improvement has in this matter been already effected. The Committee expressed a decided opinion that the terms of the money Resolution should invariably be placed upon the Notice Paper of the House ; that in the case of Bills not originating in Committee this should be done before Second Reading ; that wherever possible the Resolution should comprise a statement of the probable expenditure whether annual or capital ; or, alternatively, should be accompanied by a White Paper furnishing such a statement. Evidently there are and must be cases in which precise forecasts are impossible ; but the Committee recommended that in such cases a White Paper should nevertheless be issued giving a full explanation of the reasons why no forecast could be furnished. They further recommended that the statements of probable expenditure should be submitted to one of the proposed Estimates Committees for examination and report, unless on account of urgency or of the smallness of the sum involved the House should by Resolution dispense with this procedure in a particular case. It would then become the duty of the Estimates Committee to elucidate the facts, and to examine the basis of any estimate that may have been furnished or the reasons for not furnishing it. It must, however, be understood that the purpose in view would not be the insertion of a definite figure in a Bill in every case. That would often be impracticable, and sometimes, as the

Committee justly add, 'injurious to good administration'. The real object of these precautions would be 'to ensure that Parliament should not pass legislation involving financial commitments without a clear idea based on the inquiries of one of its own Committees of the nature and extent of those commitments, so far of course, as they can be foreseen or ascertained'.

Estimates Committees having been set up only in a truncated form the scheme adumbrated by the Select Committee could not be, in its entirety, adopted. Yet the suggestions have not been altogether without effect. On the contrary, the procedure in regard to the Money Resolution of Bills has, thanks to the awakened vigilance of private members, become more of a reality than it formerly was. White Papers are now furnished to the House; debates, brief as a rule but not quite perfunctory, have frequently been initiated; legitimate delays have been interposed when the information vouchsafed by Ministers appeared to be inadequate, and in some cases strict limitations of expenditure have been imposed.

Two other points of considerable significance deserve brief notice.

The  
Treasury  
'Watch  
Dog'

Both ultimately raise the question as to the position of the Treasury in the administrative hierarchy. The Treasury is in many respects, alike on historical and practical grounds, the most important Department of the central government. It exercises or ought to exercise a strict control over the expenditure of all other Departments. Not a penny of the sums apportioned by Parliament to the several services can legally be spent without a warrant signed by two Lords of the Treasury; and, since it is the Treasury which has ultimately to find the money, all Estimates must, as we have seen, be approved by the Treasury before they are submitted to the House of Commons by the Minister more immediately concerned. Two tendencies have, however, manifested themselves in recent years. On the one hand the Treasury, once the vigilant watch dog of the State, has itself become a great

spending Department ; on the other hand the principle of Cabinet solidarity or collective ministerial responsibility has sensibly weakened, with results detrimental to the Treasury.

On the former point Mr. Austen Chamberlain (with a large experience of the Treasury) expressed himself, in answer to the questions of the Select Committee of 1918, with great emphasis and explicitness.

' Such Bills ', he wrote, ' as the Old Age Pensions Bill or the Insurance Bill should never be in the charge of the Chancellor of the Exchequer during their passage through the House, nor, I think, should their administration after they have passed into law. The effect of placing them in the hands of the Chancellor of the Exchequer is to turn the Treasury into a spending Department. All control is abolished. There is no entrenchment behind which the Minister can take shelter, as is the case when a Bill is in charge of another Minister who must obtain the Chancellor's consent before he makes any considerable financial concession.'

The Committee so far concurred in Mr. Chamberlain's opinion as to recommend that the Treasury ' should cease itself to be a spending Department '.

As regards the relation between a Chancellor of the Exchequer and his ministerial colleagues, the Committee showed less acquiescence. The question raises a large issue, nothing less indeed than that of Cabinet solidarity. During the later years of the Great War all the time-honoured principles of Cabinet Government were necessarily jettisoned. Administration was frankly departmental, as it has always been in the United States. With a return to peace conditions the inconveniences attending the Presidential system became so glaring that the old Cabinet system was restored. How far the restoration will arrest the tendency towards departmental detachment remains to be seen, but in relation to financial control the Committee expressed themselves without ambiguity.

' We consider that the Ministry as a whole should be responsible both for making and for declining to make pro-

posals to Parliament for increased expenditure. There have been departures in recent years from the practice by which an individual minister was not considered at liberty to dissociate himself publicly from his colleagues, and, while himself retaining office, to throw upon the Treasury the onus of refusing a particular grant affecting his own Department. We deprecate these departures, which if they became the rule would make the position of the Chancellor of the Exchequer almost untenable. We recommend that the former practice should be rigidly observed.'

Most people competent to judge will probably assent to the propositions here laid down, and will agree that it is almost hopeless to look for any effective Cabinet control over public expenditure if the Departments are permitted to work in splendid isolation'.

Foreign  
Parlia-  
ments

In England, then, there is a prescribed circle of financial responsibility: the Department, the Treasury, the Cabinet, the House of Commons. Control can be rendered effective only on two conditions: first, if each link in the chain is sound; secondly, if the chain itself is unbroken. Foreign Parliaments secure co-ordination and control by other methods. From an investigation into those methods two points plainly emerge: that, in the judgement of most competent critics abroad, debates on the floor of the Chamber are useless from the point of view of controlling finance; and, consequently, that experience has proved the necessity of setting up a committee, selected from the Legislature, to act as intermediary between the Legislature and the Executive.

The  
United  
States

This device is naturally most fully developed in those Constitutions where the Executive is most completely detached from the Legislature. Among such Constitutions, that of the United States is the most conspicuous. Financial control is, to all intents and purposes, entirely vested in the committees of Congress. There is no single Budget or Finance Committee; both the Senate and the House of Representatives work through a series of committees, each concerned with a different aspect or depart-

ment of expenditure or of revenue. There is indeed no Budget or single comprehensive statement of the financial position of the country. The Secretary for the Treasury submits a written report of the financial operations of the Federal Government for the past fiscal year, with estimates of revenues for the ensuing year. The secretaries of the several Executive Departments submit to the appropriate committees estimates of the expenditure required by their respective Departments during the ensuing year, and the committees present them to Congress, by whom the particular items may, as far as time permits, be scrutinized. Of the finance committees the most important is the Committee of Ways and Means which has jurisdiction over Revenue Bills, and the chairman of that committee 'comes nearer than any one else to the position of leader of the House',<sup>1</sup> although, as already emphasized, there is and can be no 'leader' in the English sense. Until 1885 the Appropriations Committee had control over all general Appropriation Bills; but of late years there has been a marked tendency to substitute for a centralized financial control a special control exercised by various expert committees. The Appropriations Committee now possesses jurisdiction only over appropriations which are not specifically allotted to other Standing Committees. Nine of these remaining committees have power to report appropriations connected with the Departments with which they are specially concerned, among them being the Committees on Naval, Military, and Foreign Affairs.<sup>2</sup>

Commit-  
tee of  
Ways and  
Means

These committees possess enormous power. It is true that not a dollar can be expended without appropriation by Congress, and that every item of an Appropriation Bill is subject to the approval or disapproval of both Houses; but the effective life of each Congress is so short, the Bills which it has to consider are so numerous, and the time allotted for their discussion is so scanty, that control over revenue and expenditure is necessarily

<sup>1</sup> Bryce, *American Commonwealth*, i. 151.  
H. C. 378 (1914), p. 236.

concentrated in the committees. The chairmen of committees become 'practically a second set of ministers before whom the departments tremble and who, though they can neither appoint nor dismiss a post-master or a tide-waiter, can by legislation determine the policy of the administration which they oversee'. Ministers and permanent officials may be summoned before the committees and interrogated in regard to any item of expenditure or revenue. The President has, indeed, the legal power to refuse to allow his Ministers or officials to obey the summons of a Congress committee; to the President alone they are responsible, and even if they do attend they can plead that responsibility, can refuse to answer questions or produce documents, or, despite any views expressed by Congress or its committees, can, within the limits of law, persist in any line of Executive conduct on which they and their master have decided. In practice, however, such refusal is rare. The Executive Departments and their officials have the best of reasons for keeping on good terms with the Legislature, and in particular with the chairmen of committees, and generally contrive to do so.

Proce-  
dure in  
Congress

As the Executive officials are not bound to appear before committees of the Legislature, so the latter are not bound to accept the advice tendered to them by the former. The committees may refuse appropriations desired by the Departments, and, what to English ideas is much more strange, they can, and do, grant appropriations which are not wanted. Lord Bryce, writing before the Great War, observed that America is the only country in the world whose difficulty has mostly been not to raise money but to spend it. Consequently little check existed on the tendency of members of Congress to 'deplete the public treasury by securing grants for their friends or constituents or by putting through financial jobs for which they (were) to receive some private consideration'.<sup>1</sup> Should Congress force upon

<sup>1</sup> *American Commonwealth*, i. 182-3.

a too modest or even reluctant Executive revenue for which it has not asked, and which it is unwilling to spend, what, it may be asked, becomes of unexpended balances? In England, as we have seen, they are applied automatically to the extinction of debt. In America unexpended balances in the hands of disbursing officers at the end of the fiscal year are credited to the revenue of the ensuing year. After the expiration of two years they are carried to the surplus fund and are then subject to appropriation by Congress.<sup>1</sup> Any member of either House may propose amendments involving additional expenditure, but such amendments are in order only when 'authorized by existing law' or in continuation of a project or work already begun. But the part played by Congress in regulating and controlling national expenditure is in truth little more than perfunctory, apart, of course, from the work of the committees already described.

Under the actual conditions imposed by the American Constitution, the system of Standing Committees is indispensable to the reasonably efficient conduct of public affairs. But such measure of efficiency as results is secured at the cost of emasculating Congress and destroying its sense of corporate responsibility. The Standing Committees do their work for the most part in secret—a method which evidently facilitates if it does not encourage jobbery. Moreover, the fundamental weakness of the committee system is further exaggerated by the multiplication of committees and the extreme subdivision of their functions. In particular it is hopeless to look for economy so long as the duty of devising ways and means for the raising of revenue is divorced from that of regulating expenditure. In the House of Commons members who assent to votes in departmental estimates are aware that it is they who will have to find the money. In America one set of men working in isolation and in secret vote an appropriation, to another set working under the same conditions it falls to devise ways and means, and to

Criticism  
of American  
System

<sup>1</sup> H. C. 378 (1914), pp. 302, 304.



do it, curiously enough, without reference to the amount or objects of expenditure. Both sets of men are, moreover, out of touch with the Executive officials who will have the actual spending of the money voted by Congress. Lord Bryce has on this matter delivered a judgement from which few people on either side of the Atlantic will be disposed to dissent :

‘ The administration instead of proposing and supervising, instead of securing that each department gets the money that it needs, that no money goes where it is not needed, that revenue is procured in the least troublesome and expensive way, that an exact yearly balance is struck, that the policy of expenditure is self consistent and reasonably permanent from year to year, is by its exclusion from Congress deprived of influence on the one hand, of responsibility on the other. The office of Finance Minister is put into Commission, and divided between the chairmen of several unconnected committees of both Houses. A mass of business which specially needs the knowledge, skill, and economical conscience of a responsible ministry, is left to committees which are powerful but not responsible, and to Houses whose nominal responsibility is in practice sadly weakened by their want of appropriate methods and organization.’<sup>1</sup>

A foreign critic may well wonder how the system works at all. The only possible explanation is that it works because America is America ; because in finance, as in foreign affairs, the conditions of the American polity are peculiar, not to say unique ; because, in both spheres, the problems are relatively simple ; and because the American people have enough of political genius to educe order out of conditions which to most other peoples would involve chaos.

The rigid application of the principle of the separation of powers, to which repeated reference has been made in previous chapters, prohibits the possibility of adapting the apparatus of English finance to American institutions. A parliamentary Chancellor of the Exchequer would be wholly inconsistent with the fundamentals of the Constitu-

<sup>1</sup> *American Commonwealth*, i. 213.

tion. Yet an English critic finds it, nevertheless, difficult to understand the reason, even in the absence of a parliamentary Ministry and a regular Budget, for the excessive subdivision of financial functions. He is apt to conclude, perhaps too hastily, that the system exhibits a *reductio ad absurdum* of a philosophic formula, and, in special degree, illustrates the possibility that obstinate adherence to the principle of equality may easily endanger the equally democratic principle of liberty.

France stands in respect of financial procedure, if not precisely midway between England and the United States, at some distance from both, though much nearer to England than to America.

Financial  
Procedure  
in France

Each Chamber has its Budget Commission, but the functions of the two are so closely parallel that the following description will deal only with that of the Chamber of Deputies. The Budget Commission consists of 44 members who are appointed by the Bureaux for the duration of the Session, though in certain cases its powers may be prolonged from one year to another by a special resolution of the Chamber. The Budget itself is submitted, on the responsibility of the Ministry, to the Chamber, but is referred for detailed examination to the Budget Commission. The Commission sits daily throughout the greater part of the session, and for the consideration of the annual Budget it divides itself into a number of special sub-committees, each of which considers a special part of the Estimates, and presents a detailed report upon it. The Commission has the right to send for papers and to require Ministers and permanent officials to attend and give evidence. No Minister has the right to attend, but, if he expresses a desire to do so, he is generally invited, but only to give information. Nor may any Deputy, other than members of the Commission, attend, save for a similar purpose. The proceedings are secret, and the minutes, though deposited in the Chamber, can be consulted only after the final passage of the Finance Bill. The items of the Budget can be cut down by the Commission or

Budget  
Commis-  
sions

increased, with or without the assent of the Finance Minister. The special reports of the sub-committees are co-ordinated in the General Report of the full Commission which is presented to the Chamber by the *rapporteur général*. The position of this functionary is very influential and in some senses superior to that of the Finance Minister himself, since the Ministry are precluded from moving amendments in the Chamber, and consequently from inviting it to reverse the decisions of the Commission. The latter is, therefore, supreme in its control over the annual finances. Ministers are practically at its mercy, and accord between them and the Commission is secured, as M. Dupriez observes, only when the Ministry submits to the dictation of the Commission.<sup>1</sup>

A similar procedure is followed by the Senate which also has its *Commission du Budget*, but the Senate has no power of initiating financial legislation, and though its right of rejection is unquestioned its right of amendment is not. Gambetta attempted in 1882 to revise the powers of the Senate in respect to finance ; but he was unsuccessful, and consequently the powers of the Senate in this sphere have remained somewhat dubious. In practice, the tactics of the Chamber have tended to reduce the power actually entrusted to the Senate by the Organic Laws. By deferring the passage of the Budget to the latest possible moment the Chamber compels the Senate to choose between the alternative of rejecting the Budget, and 'driving the Ministry to a provisional levy of taxation needing to be subsequently confirmed'. Lord Bryce deprecated this practice on the ground that finance is a subject which the Senate understands. 'The reports of its Commission on the Budget', he adds, 'are always careful and usually sound, but they have little effect in checking either the extravagance or the fiscal errors of the deputies.'<sup>2</sup>

<sup>1</sup> Léon Dupriez, *Les Ministres dans les principaux pays d'Europe et d'Amérique*. Paris: 3 vols. (3rd ed., 1892-3).

<sup>2</sup> *Modern Democracies*, i. 265.

To both defects the system of Budget Commissions would unquestionably appear to contribute. The operation of the system is much less deleterious than in America, as the system itself is less elaborately articulated. Moreover, France possesses what the United States does not, a parliamentary Executive. But any advantage which the Cabinet principle may be held to confer is to a large extent neutralized, notably in the sphere of finance, by the traditional suspicion of the Executive still entertained by the Legislature—a suspicion which is constitutionally manifested in the rules under which the Budget Commission operates. In finance, the authority of the Commission overshadows that of the Cabinet, and the position of its *rapporteur général* rivals that of the Finance Minister.

The arrangements for the audit of the public accounts in France are similar to those which obtain in England, and are understood to be not less effective. The rules which govern the examination of the Budget are, as we have indicated, widely different, and doubtless the grave inconveniences attaching, in English eyes, to the French system have led experienced statesmen and officials, in England, to question the wisdom of conferring enlarged powers upon the Estimates Committee of the House of Commons.

Audit of  
Accounts

The inconveniences are evident; but the English system, while avoiding the reckless extravagance of the French, can hardly be said to achieve economy, or to secure to the House of Commons any effective control over national expenditure. Cabinet responsibility is, and must remain, a cardinal principle of English Government; the rule which confers upon the Crown only, and its Ministers, the right to propose expenditure is one of the most salutary of our constitutional safeguards, and should be inflexibly maintained; but short of the French *Commission du Budget*, and very much farther short of the multitudinous Committees of the American Congress, there would seem to be room in the procedure of the English Parliament for one or more Committees on

Com-  
parisons

Estimates which might secure to us some of the advantages, without incurring the inconveniences, revealed by experience of the systems adopted in foreign Parliaments.<sup>1</sup>

<sup>1</sup> Budget Committees, more or less on the model of the French Commissions, existed in the Legislatures of Italy, the German Empire, Austria, Sweden, Denmark, and Switzerland, and possibly elsewhere. Neither Holland nor Belgium possessed permanent Budget Committees. (H. C. 378 of 1914.)

## XXII. PARLIAMENTARY PROCEDURE

### *The House of Lords. Legislature and Executive. Foreign Legislatures and International Affairs*

'No one who is not blind to the political development of our time can have failed to perceive that parliamentary government has . . . become the chief problem in the science of public law—in the theory and practice of politics. Nor can there be any doubt that the central element of the problem, as it now presents itself, is the manner in which a parliament is to discharge the function of enabling the State to perform its regular work.'—DR. JOSEF REDLICH.

'The main problems of Parliamentary procedure under existing conditions are two: on the one hand, how to find time within limited Parliamentary hours for disposing of the growing mass of business which devolves on the Government, and on the other hand, how to reconcile the legitimate demands of the Government with the legitimate rights of the minority—the dispatch of business with the duties of Parliament as the great inquest of the nation at which all public questions of real importance find opportunity for adequate discussion.'—SIR C. P. LIBERT, Clerk of the House of Commons.

'There is no more striking illustration of the immobility of British Institutions than the House of Commons.'—LORD OXFORD.

'The adjustment of relations between Executive and Legislature in the conduct of foreign affairs has been in many free countries one of the most difficult and indeed insoluble problems of practical politics.'—LORD BRYCE.

THE procedure of the House of Lords, though more elastic than that of the Commons, is, as regards ordinary legislation, virtually identical with it. But over Money Bills the Lords have, since 1911, had no control. The term 'Money Bill' had for a long period been regularly used without precise definition, and there still remains some uncertainty of interpretation. But under the Parliament Act, 1911, the term has now received statutory definition. A 'Money Bill' is a Public Bill which in the opinion of the Speaker of the House of Commons, Proce-  
dure in  
House of  
Lords

'contains only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration, or regulation of taxation; the imposition for the payment

of debt or other financial purposes of charges on the Consolidated Fund, or on money provided by Parliament, or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue, or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; or subordinate matters incidental to those subjects or any of them.'

A Money Bill, when it is sent up to the House of Lords, must be endorsed with the Speaker's certificate, but that endorsement is conclusive and cannot be questioned in any court of law; though discussion has, inevitably, arisen as to whether, in given cases, such a certificate ought to be given or withheld.<sup>1</sup>

Apart from Money Bills the procedure in the House of Lords differs so little from that of the House of Commons that it calls only for a brief description. Like the Commons the Lords have complete control over their own proceedings, but the pressure of business being less, their rules are less stringent. Thus in asking and answering questions debate is permitted, without any formal motion being proposed to the House. Debates are altogether less formal in the Upper House, as evidenced by the rule that peers may now be alluded to by name, whereas in the Commons each member must, in debate, be distinguished by the office he holds, by the Constituency he represents, or by some other designation. Courtesy in treatment of colleagues is rigidly insisted upon in both Houses.

<sup>1</sup> For example: in reference to the Housing (Financial Provisions) Bill, 1924, the question was raised whether it would be certified as a Money Bill. Neither the fact that it involved a large expenditure of public money, nor that it originated in Committee of Ways and Means (on a financial resolution) would, I submit, have sufficed to bring it within the category. If such reasons were held to bring Bills within the definition, few Bills involving social reforms would be excluded. The definition or description contained in the Parliament Act is, however, far from satisfactory; it is at once curiously inclusive and curiously restrictive. On the one hand, Bills have been certified as Money Bills although they did not grant money to the Crown for supply services (as, e.g., the Public Buildings Expenses Bill of 1913); while, on the other hand, the Finance Bills of Sessions 1911, 1916, 1917-18, 1918, 1921, and 1923 failed to secure the Speaker's certificate as 'Money Bills'. On the whole of this intricate question cf. May, *Parliamentary Practice* (ed. Webster), pp. 435 seq.

Standing Order No. 28 of the House of Lords directs 'that all personal, sharp, or taxing speeches be forborne', and that if offence be given the House 'will sharply censure the offender'. Nor is the Lower House less insistent upon good manners. The Upper House is in one sense more democratic than the Lower: all members, official and unofficial, are on an equal footing; the Government enjoys no special privileges in debate. Nor is there any closure or 'guillotine'.

Much the most significant difference consists in the position of the Speaker. Ordinarily, and by prescription, the Lord Chancellor, or Lord Keeper of the Great Seal of England, is Prolocutor of the Upper House, and by Standing Order No. 5 he is required to attend the House in that capacity; but if he be absent, or if there be none authorized under the Great Seal to supply his place, the peers may, during the vacancy, choose their own Speaker. The Prolocutor, singularly enough, need not necessarily be a peer. Lord Brougham, for example, presided as Lord Chancellor before he was raised to the peerage, and when the Great Seal has been in Commission the Crown has appointed the Master of the Rolls, or the Chief Baron of the Exchequer (an office now extinct), or even a Vice-Chancellor to function as Lord Speakers. Sir Robert Henley presided over the House of Lords as Lord Keeper for three years (1757-60) as a commoner, though he was subsequently raised to the peerage and held office as Lord Chancellor through three successive administrations.<sup>1</sup>

The Lord  
Speaker

The House itself appoints the Chairman of Committees who presides in all committees of the whole House, and, unless it shall have been otherwise directed by the House, in all committees upon Private Bills. The House may also elect a Speaker *pro tempore*, when the Lord Chancellor and all the Deputy Speakers (nominated by the Crown) are absent.

The position of the Lord Speaker is in several respects

<sup>1</sup> May, *op. cit.*, p. 175, and Lord Henley, *Memoir of Lord Chancellor Northampton*.



anomalous. As a member of the Government he is in no sense raised above parties ; he frequently acts as spokesman of the Government and may even act as leader of the House.<sup>1</sup> On the other hand his authority over his fellow peers is strictly limited. If more than one peer rises at the same time, it is for the House, not for the President, to decide which shall be heard, though if the President himself be one of them precedence is by custom accorded to him. Speeches are addressed, consequently, not to him but ' to the rest of the lords in general '. Another result of his limited powers is ' that a peer who is disorderly is called to order by another peer . . . ; and that an irregular argument is apt to ensue in which . . . recrimination takes the place of orderly debate. There is no impartial authority to whom an appeal can be made, and the debate upon a question of order generally ends with satisfaction to neither party, and without any decision upon the matter to which exception had been taken.' <sup>2</sup>

It remains to ask three questions : (i) How far the procedure of the English Parliament is effective in enabling it to perform the functions imposed upon it ; (ii) whether and, if so, in what directions it could be improved ; and (iii) whether the procedure adopted in foreign Parliaments furnishes any hints for such improvement.

Select  
Commit-  
tees on  
Public  
Business

That the House of Commons is anxious to improve its methods of conducting public business may be inferred from the fact that since 1832 it has appointed no fewer than seventeen Select Committees to inquire into and report on procedure. Of these no fewer than six have sat since 1906, a sufficient indication of the increasing dissatisfaction with existing methods.

Sittings  
of Parlia-  
ment

The latest inquiry (1923-4) <sup>3</sup> was concerned with the desirability of altering the customary period of the Parliamentary Session—a matter which was also discussed

<sup>1</sup> As in the case of Viscount Haldane of Cloan, Lord Chancellor in the Macdonald Ministry of 1924.

<sup>2</sup> May, *op. cit.*, pp. 309-10.

<sup>3</sup> House of Commons Papers 112 (of 1924).

by the Select Committee of 1914.<sup>1</sup> For nearly two decades Parliament has sat throughout the greater part of the year. Out of the last nineteen years autumn sessions or sittings have been held in no fewer than sixteen, and it is the view of the latest committee that it must be assumed that, except under very special circumstances, an autumn session will be of normal occurrence. At present the session is habitually opened on the assumption that the work of the session will be completed by sitting into the late summer. The expectation is hardly ever fulfilled, with the result that Parliament, having sat far into August, is again summoned in the autumn. There would seem to be general agreement on two points: (i) that the present normal sittings of Parliament are sufficiently if not unduly prolonged; and (ii) that it is undesirable for Parliament under any circumstances to sit beyond the end of July. Mr. Asquith was convinced, even in 1914, that the session was already too long, and that its prolongation was having a serious effect not only on the health of members and the efficiency of Ministers and Departments, but also on the attractiveness of Parliament to the kind of men it is desirable to attract. Perhaps post-war experience may to some extent have dissipated the latter apprehension. 'Business' is, however, a serious competitor to Parliament, and it is increasingly difficult to induce the captains of industry and finance to exchange the city, or the cities, for Westminster, though many of them ultimately find a place, to the great advantage of Parliament as a whole, in the Second Chamber. A yet older type of members—the cadets of good family and the leisured inheritors of commercial wealth—is still largely represented in the House of Commons. Nevertheless, it must be admitted that it would be a grave disaster if Mr. Asquith's fears were realized and the House were to be composed of men to whom a salary of £400 was a consideration.

<sup>1</sup> House of Commons Procedure (378 of 1914). See especially evidence of Mr. Speaker Lowther, Mr. Asquith, and Mr. Balfour.

Parlia-  
mentary  
Counsel's  
Office

The real objection, however, to a prolongation of Parliamentary Sessions concerns the work, not of the Legislature, but of the Executive, and in particular that part of the Executive to which pertains the pro-bouleutic function, and the preparation of the annual estimates. In 1869 there was established an official department, under a Parliamentary Counsel of great experience, to which all the Government Departments have a right to resort for the drafting of Bills. The staff of the office now consists of the Parliamentary Counsel and two assistants, with clerks, &c. Since the establishment of this office the custom formerly prevailing of having Bills prepared by the legal officers attached to the several departments has been gradually discontinued, and the work of preparing legislation for all departments is now, to the general advantage of the public service, concentrated in a single office which commands the services of highly skilled and specialized officers.

Drafting  
of Bills

That the drafting of Bills still leaves much to be desired is a common complaint among unofficial Members of Parliament, still more among the public ; but how difficult and highly technical a task it is can be appreciated perhaps only by those who, as amateurs, have attempted it. Above all, it is a task which takes time. Instructions for the preparation of Bills are not, in the normal course of business, received before November, and an important Bill often involves fifteen or twenty amended drafts, most of which have to be referred by the Parliamentary Counsel to the Cabinet or a Cabinet Committee. It is, therefore, not surprising to learn that experienced draftsmen estimate that the drafting of an important Government Bill involves two and very often three months for completion.

Autumn  
Sessions

Drafting is, however, a relatively late stage in the process of legislation. Departmental and Cabinet work, often prolonged, must precede the transmission of instructions to the Parliamentary Counsel, and even if Parliament rises at the end of July such work can hardly

begin, if Ministers and their secretaries are to have a reasonable holiday, before October. Regular autumn sessions can hardly fail to result in scamped and hurried preparatory work, involving the expenditure of additional time in Parliament, not to add unsatisfactory legislation. With these considerations in mind it is hardly surprising that the Joint Committee unanimously rejected the proposal that Parliament should be opened about the beginning of November and sit until just before Christmas ; and again from the third week of January until the end of July. It was suggested that during the Autumn Sitting Parliament should dispose of the address in Reply to the Gracious Speech from the Throne ; and that in the House of Commons the Committees of Supply and of Ways and Means should be set up, the Supplementary Estimates passed, and the Second Readings of the main Bills of the Session should be taken.<sup>1</sup> That the existing arrangement involves great pressure of financial business in February and March cannot be denied ; but to require the Departments to prepare in October their Supplementary Estimates covering expenditure up to 31 March would almost certainly result in over-estimating, while the time for the preparation of Bills would be disastrously curtailed. As an alternative, the Joint Committee suggested that Parliament should continue to meet after the turn of the year, and sit until near the end of July ; with the understanding that if the business of the session could not be concluded by or about that date it should be adjourned until October or November. Autumn Sittings might, under favourable circumstances, sometimes be avoided, and where they were inevitable the length of them would depend on the amount of work which, so far as could be estimated in July, would have to be accomplished before Christmas.

The law and custom of Foreign Parliaments in this respect greatly vary. In France, Belgium, and the United

Foreign  
examples

<sup>1</sup> By Sir Leslie Wilson, Patronage Secretary to the Treasury, 1921-3.

States the sittings of the Legislature are regulated by Constitutional Law. In France the statutory term is from the second Tuesday in January to 14 July, at earliest, with an additional session from the end of October or early in November until 30 December. The United States Congress sits from the first Monday in December to 3 March, or Midsummer (in alternate years), and the Belgian Parliament from the second Tuesday in November to May or the end of July (in alternate years). In democratic Switzerland the Federal Legislature does not as a rule sit for more than fifty days in the year : for three or four weeks in June ; from the first Monday in December to Christmas, and occasionally for a fortnight or three weeks in Spring and Autumn. The Swiss peasants cannot afford to be absent for protracted periods from their ordinary avocations. Other Parliaments, like our own, regulate their sittings not by law, but by custom. No foreign Parliament, except the French, excels our own in assiduity of attendance.<sup>1</sup> The average number of days in a session on which the Swiss Parliament sits is 50 ; the Swedish 70-75 ; the Belgian 120-130 ; the French 200 ; while the English Parliament has in the last six years (1919-24) sat on an average 142 days, though its sittings were interrupted by no fewer than three General Elections. The English Parliament cannot, then, be accused of sloth. But is it efficient ? Are its methods well adapted to its functions ? Could they be improved ? To these questions some answer, however summary, must be attempted, before we complete the survey of this portion of the subject.

Func-  
tions of  
Parlia-  
ment

Efficiency must be judged in relation to functions. The functions of the English Parliament, be it recalled, are not confined to legislation, either ordinary or financial. They are also deliberative and critical. Above all, it is the business of Parliament, and particularly of the House of Commons, to maintain and sustain, and within limits to control, the Executive Government. This latter function

<sup>1</sup> See Appendix to Report of Select Committee of 1914.

is performed partly by means of constant interpellations, by debates on policy, and, most important of all, by vigilant control over public expenditure.

Of the process of legislation enough has been said already, but some words must be added on the functions of criticism and control. Debates on matters of general policy can be initiated in the House of Lords almost at any moment and by any individual peer, and such debates are usually maintained, in the Upper House, on a high level of excellence and with great advantage to the political education of the country at large. In the House of Commons opportunities are afforded by the debate on the address in reply to the speech from the Throne; on 'days' allocated for the purpose by the Government, generally on the demand of the Opposition leaders; on motions for the adjournment of the House, and, in particular, in Committee of Supply. The exercise of this important function gives rise frequently to what are colloquially known as 'full-dress debates'—occasions on which party is arrayed against party, when the leaders cross swords in dialectical conflict, and the House, and even the country, is roused to a high pitch of excitement. But for these occasional gladiatorial displays the days of the Parliamentary would, however fruitful in results, be mostly rather dreary and drab.

Deliberation and Criticism

To this somewhat deterrent generalization the Question hour may, perhaps, be regarded as forming an exception. Questions now occupy the first hour of public business on the first four days of the week, and may be put down on Fridays, though it is understood that Ministers need not, on Fridays, be present to answer them. The Question hour is, with private members, the most popular part of the day's proceedings; indeed, save on the occasion of a 'full-dress' debate, it is the only hour of the day when the Chamber is crowded. This is not unintelligible. 'Questions' afford to the private member, under modern conditions, almost his only opportunity. In ordinary debates he may sit for hours and even for days without

'Questions'

being 'called'. But with some little knowledge of procedure, and some ingenuity in the framing of questions, he can be reasonably certain of 'getting in', not only with his original questions, but with one or more supplementary questions 'arising out of the original answer'. As a rule some 80-100 questions, in addition to 'supplementaries', are daily disposed of. Questions may be either oral or written. The former are marked with an asterisk on the Order Paper, and give the inquirer, and indeed other members, the chance of putting supplementary questions to the Minister. Supplementary questions afford to the questioner the chance of displaying parliamentary ingenuity, and to the Minister the chance of proving his knowledge of his particular job, and still more his dialectical adroitness. Questions of merely local or personal interest, touching, for instance, the claims of individual constituents, should be, and often are, relegated to the written category, in which case the member receives the desired information by letter from the Department.

Origin of  
'Questions'

That the privilege of interpellation may be abused is obvious; it is, indeed, one of the most important and, be it added, one of the most delicate functions of the Speaker to check the abuse of it; but any attempt to curtail it is rightly regarded with extreme jealousy by members of Parliament, and to abolish it would be to alter the whole character of Parliamentary Democracy as evolved in this country.

The practice of permitting the interrogation of Ministers is, indeed, coeval with the dawn of Cabinet Government. The earliest recorded instance of a parliamentary question occurred on 9 February 1727, when, in the House of Lords, Lord Cowper called attention to a report that a certain offender, named Knight, against whom the House of Lords wished to institute proceedings, and who had absconded, had been arrested in Brussels, which being a matter in which the public was highly concerned, he desired those in the administration to acquaint the 'House whether there was any ground for that report'. Where-

upon Lord Sunderland, First Lord of the Treasury, stated that the Report was true, and informed the House in what manner Mr. Knight had been apprehended and secured—taking credit to the Government for the promptitude and energy they had exhibited.<sup>1</sup> Only, however, within a recent period has the practice been formally recognized. On 29 April 1830 the Speaker of the House of Commons ruled that ‘there is nothing in the orders of this House to preclude any member from putting a question and receiving an answer to it’, and that the proceeding ‘though not strictly regular affords great convenience to individuals’. On the following day, after some objections and explanations, a question was, by courtesy, allowed precedence over an item which had been fixed as the first order of the day.

Questions appeared on the Paper for the first time in 1849,<sup>2</sup> and in 1854 the time and method of putting and answering questions was actually regulated. In that year Mr. (afterwards Sir Thomas) Erskine May prepared, under the direction of the Speaker, a *Manual of the Rules and Orders of the House of Commons*; and Rule 152 provided that, ‘before the public business is entered upon, questions are permitted to be put to Ministers of the Crown relating to public affairs; and to other members, relating to any Bill, motion, or other public matter connected with the business of the House, in which such members may be concerned.’<sup>3</sup>

This cherished privilege is strictly limited, though in the opinion of Mr. Balfour the practice had already reached ‘rather extravagant proportions’ in 1914, and it has not diminished since.<sup>4</sup> Limits

Questions must relate to the public affairs with which the Minister to whom they are addressed is officially concerned, to any matter of administration for which he is responsible, and to proceedings pending in Parliament.

<sup>1</sup> *Parliamentary History*, vii. 709; Campbell, *Lives of the Chancellors*, iv. 398.

<sup>2</sup> Select Committee of 1914, Q. (Mr. Swift MacNeill), 1233.

<sup>3</sup> Todd, *Parliamentary Government*, ii. 341.

<sup>4</sup> Q. 1240.



They should not be put if the information sought can be obtained from ordinary sources, and they must not concern the internal affairs of a friendly State or a Dominion; nor must they contain reflections upon the Sovereign nor upon the conduct of the heir to the throne, the Viceroy of India, the Governors-General of the Dominions, the Judges, the Speaker or the Chairman of Ways and Means, or members of either House of Parliament. Questions must seek and not convey information; may not contain statements of fact, nor arguments, inferences, or imputations. Epithets are not allowed, nor quotations nor controversial or ironical expressions.<sup>1</sup> Any question may be disallowed by the Speaker, who exercises the closest scrutiny over them before allowing them to appear on the 'Paper'; and a Minister may refuse to answer them without giving further reason than that it is, in his judgement, against the public interest to do so.

Questions may be debated in the House of Lords but not in the House of Commons, though a member, if dissatisfied, may give notice that he will raise the matter on the motion for the adjournment of the House, in which case, if he can keep a quorum, he may get a debate of about twenty minutes. Formerly it was within the power of any two members to move and second a motion for the adjournment of the House either during Questions or at any moment before the commencement of public business, and to raise thereon a general debate. But this right led to grave abuse of the time of the House, and, since 1882, such a motion can only be made immediately after Questions, with the assent of not fewer than forty members, and after the Speaker has decided that the question raises 'a definite matter of urgent public importance'. Urgency and definiteness are of the essence of the matter. The Speaker frequently refuses on one or other or both of these grounds to put the question to the House, and even when put, the House not infrequently declines to assent.

<sup>1</sup> May, *Parliamentary Practice*, pp. 221 seq.

Questions have no place, of course, in Legislative Bodies to which, as in the Congress of the United States, the Executive is not responsible, but they are an essential part of the procedure in those Parliaments which have modelled themselves on that of Great Britain, though there is no Legislature in the world where the Executive is subjected to an equally severe bombardment.<sup>1</sup> The Federal Legislature of the Swiss Confederation is, as already indicated, pre-eminently native born, but although the Executive Council occupies in Switzerland a peculiar position in face of the Legislature, the rules of both Chambers provide for questions and permit the questioner to declare whether he is satisfied with the answer. No debate may, however, take place. In striking contrast to the procedure of the French Parliament which presupposes on the part of Senators and Deputies a spirit of sleepless vigilance, not to say perpetual hostility towards the Executive, Swiss procedure presupposes mutual confidence and benevolent goodwill, and knows nothing of the contrivances which are designed to harass and entrap Ministers.

The German Constitution of 1871 was in several respects anomalous, and in none more than in its definition of the relations of the Legislature and the Executive. The Chancellor was the sole Imperial Minister and was responsible not to the Legislature but to the Emperor. As Minister he had no place in the Reichstag; but as a member of the Bundesrat he could, like other members, attend the sittings of the Reichstag, and in that capacity he answered the interpellations addressed by the Reichstag to the Bundesrat. Debates on interpellations were permitted if demanded by fifty members, but no order of the day followed, nor did the Chancellor resign in consequence of an adverse vote.

The new German Constitution (1919) provides that the Chancellor, the National Ministers (the Cabinet), and their deputies may attend the sittings of the Reichstag and the Reichsrat and their Committees, and are bound

<sup>1</sup> Mr. Balfour's evidence before Select Committee of 1914, Q. 1156.

to do so, if summoned. They are entitled to be heard, at their request, and to propose resolutions. The Chancellor lays down general policy and bears the responsibility thereafter in the Reichstag, but individual Ministers are severally responsible for their own Departments. Ministers are obliged to keep the Reichsrat informed of the course of current business, and to consult the competent committees of the Reichsrat in their deliberations on subjects of importance. Should the Reichstag withdraw its confidence from the Chancellor or any other National Minister, the Minister so censured must resign. The new Constitution marks, therefore, a considerable advance in the direction of Parliamentary Democracy, though the Departmental principle, as opposed to that of complete Cabinet solidarity, is still maintained.

Italy The Italian Constitution approximates more nearly, perhaps, to that of England than does that of any other continental State, but in regard to the particular point of Parliamentary procedure now under discussion, Italy stands midway between England and France. The Italian Cabinet is slightly less dependent upon the caprice of the Legislature and less restrained by the Committee system than that of France, but Ministers are exposed not only to 'Questions' in the English sense, but to 'Interpellations' according to the usage of France. Yet with a difference. Ministers are exposed to 'Questions' as in England, but the Standing Orders provide that the answer of the Minister must not be made use of either in order to initiate a debate or to enable the deputy to make a declaration. As in France, however, a formal 'Interpellation' may be followed by a debate and a vote on the order of the day. But the debate and vote must take place, not as in France immediately after the answer of the Minister, but on a subsequent day. This precaution not only allows time for members to cool down and for excitement to evaporate, but also for calm calculation as to whether it is or is not desirable to displace the Cabinet.<sup>1</sup>

<sup>1</sup> Lowell, *Governments*, i. 211.

For the widest latitude in the use both of simple 'Questions' and elaborate 'Interpellations', we must turn to France. The Napoleonic Empires, First and Second, to say nothing of the *Ancien Régime*, have bequeathed to the modern Frenchman a tradition, curiously blended, of reliance upon bureaucracy and mistrust of the political Executive. Adherence to the principle of Administrative Law does not prevent the constitutional jurist in France from placing every possible obstacle in the path of the Parliamentary Executive. Of the most powerful of the checks exercised by the Legislature over the Executive, that of the Committee system, something must be said presently. Even more harassing in the conduct of Parliamentary business are 'Interpellations'. 'Questions' in the English sense do not play any great part in French procedure. Oral questions are permitted only if the consent of the Minister has been previously obtained. They can be put at the beginning and end of any sitting, but in the four years (May 1910—July 1913) only 47 questions were thus put—less than half the number ordinarily answered in a single sitting of the English Parliament. In the same period there were, however, 3,147 written questions. A Minister's previous consent is not, in this case, required, but he may refuse to reply in the interests of the public service, or may ask for time to prepare his reply. Replies must, however, be printed and circulated within eight days.

The 'Interpellation' is a much more serious matter. It is, indeed, the ordinary means of bringing about a ministerial crisis. Any member is entitled to interpellate a Minister, who is bound to reply, and on the reply a debate may arise. The Chamber itself fixes the time of the discussion which for questions of domestic politics must not be more than a month ahead. Questions touching foreign affairs may be indefinitely postponed. During the period May 1910 to July 1913, no fewer than 481 interpellations were deposited, of which 167 were discussed, 29 were withdrawn, and 285 failed to secure a day.

*Ordres  
du jour*

The method of interpellation was first introduced into the French Chamber during the reign of Louis Philippe (1830-48), but at that time no motion was made on the subject-matter of the interpellation. In order, however, to dispose of the interpellation, it was necessary to move to proceed to the Order of the Day. This procedure is still in use under the name of The Order of the Day *pure and simple*. It is equivalent to the 'previous question', and, if carried, involves neither acquittal nor condemnation. Hostile critics may, however, move an *ordre du jour motivé*, in which case an expression of opinion with regard to the conduct of the Ministry may be tacked on to the motion for the Order of the Day. These *ordres du jour motivés* may reflect all shades of approval or condemnation. Several may be, and usually are, proposed on each interpellation, but, many or few, they can be discussed concurrently, while the Chamber itself decides the order in which they shall be put to the vote. If the motion preferred by the Government is rejected, or if a hostile motion is carried, provided the matter is deemed to be of sufficient importance, the Cabinet resigns.<sup>1</sup>

Standing  
Commit-  
tees

Questions and 'Interpellations' afford the most obvious means, open to a Legislature, of criticizing and controlling an Executive. But much more effective, as a method of exercising continuous control over the Ministry, is the system of Standing Committees. Such Committees play a far more important role in most foreign Legislatures than in our own. Moreover, these Committees are, in most cases, much more independent of the control of the Chamber, and much more powerful in face of the Executive. Their functions may be conveniently considered in reference to general legislation, to finance, and to international affairs.

The general mode of procedure in foreign legislatures centres round the Committee system. The English

<sup>1</sup> Report of Select Committee (378 of 1915), pp. 241-3. Cf. Cmd. 2282 of 1924.

system of Three Readings, in addition to Committee stage and Report, is virtually unique. Elsewhere<sup>1</sup> the general rule is to refer all Bills immediately, and without preliminary discussion, to a Committee—either a special or *ad hoc* Committee; or more commonly a Standing or permanent Committee. After consideration in Committee, a Bill is reported to the Chamber or Senate, as the case may be, by the member of the Committee chosen to act as *rapporteur*. This appointment is eagerly sought after; it brings the member into the parliamentary limelight and confers upon him special rights in debate. The Committee, through its reporter, recommends the Chamber to accept, amend, or reject the Bill. Committees of the Chamber are bound to report within four months of the date of the reference; Senatorial Committees within six, or within three, in the case of a Bill originating in the Senate but amended in the Chamber. Both Chambers leave at least one day a week free for the work of the Committees. Discussions in Committee are private, but minutes are kept in summary form and are deposited in the archives of the Chamber concerned, where they are open to confidential inspection by members. Ministers are entitled to attend Committees, as auditors only, and may be required to attend as witnesses. Committees may also, with the Ministers' consent, summon as witnesses the competent departmental officials. If, however, the Minister is sure of support in the Chamber, he can refuse to attend or to allow his officials to attend. The Committee having reported on a Bill, one discussion in the Chamber is generally held to suffice. In France and many other continental States there is, in the Chamber, only one discussion, but taken in three stages: (i) a general discussion followed immediately by (ii) discussion of articles, and (iii) a final vote on the whole Bill. In the Senate there are two examinations with a five days' interval between them.

The countries where the Committee system has been

Com-  
mittee  
system in  
France

<sup>1</sup> The description that follows applies more particularly to France. Cf. Cmd. 2282 of 1924.

worked out with the greatest elaboration are France and the United States. Of the former M. Joseph Barthélemy writes: 'Theoretically no question comes before either House before it has been studied by a Committee whose findings are set down in a brief report.'<sup>1</sup> The French Chamber, at the beginning of each Parliament, nominates twenty *Grandes Commissions permanentes*, corresponding roughly to the Chief Departments of State. The members are appointed for the lifetime of the Parliament, and each consists of 44 members. In addition to these there are an indefinite number of *Grandes Commissions diverses*, similarly appointed for the lifetime of the Parliament. Each contains 44 or 22 members. The Senate similarly sets up annually twelve *Grandes Commissions*, each of 36 members. In both Houses the members are nominated by the groups, in proportion to their numbers. All Senators and Deputies are asked to attach themselves to a group. Of these groups (with more or less differentiated political tenets), there are at present (1924) nine, while the 'unattached' or independent members form for certain purposes a tenth group. The nominations of Committee-men by the groups has to be approved by the Chambers, but this approval is a mere matter of form. In the event of objection, the Committees are nominated by *scrutin de liste*, each Deputy or Senator having a number of votes corresponding to the number of Committee-men to be nominated.

Besides the Standing Committees there are certain monthly Commissions, each consisting of 11 to 22 members, and each House has its Budget Committee, consisting of 33. These are nominated by the sections or *Bureaux* into which all members of both Chambers are redistributed monthly by lot. There are 11 *Bureaux* in the Chamber and 9 in the Senate, and each nominates, according to the size of the Committee, one, two, three, or four Committee-men. This curious system is one of the few relics of the *ancien régime* still to be found in the parliamentary procedure of

<sup>1</sup> *The Government of France*, p. 49.

modern France. It was a common device alike in the ecclesiastical assemblies, and to a less degree in the *États généraux* of the old monarchy ; it reappeared in 1789, and still forms a characteristic and curious feature in the working of political institutions under the third Republic.

It is noticeable that as regards the process of legislation Continental Europe has been prone to follow the French rather than the English model. Whether this is due to a desire to attain greater scientific precision in legislature, or to a failure to apprehend the niceties of the English Cabinet system and the consequential relations between the Executive and the Legislature, cannot be summarily determined. The fact remains that foreign Parliaments have almost without exception adopted a procedure which, while it may conduce to more precise legislation, seems to English eyes to savour of undue encroachment upon the sphere of the Executive.

More particularly is this true of the control exercised by the Parliaments of Foreign States over international relations and over finance.

Hardly one of those Parliaments has so little direct control over international affairs as our own. Perhaps the most striking illustration of recent developments in this respect is furnished by the new German Constitution.

Under the Imperial Constitution the conduct of foreign affairs was the strictly guarded and exclusive prerogative of the Kaiser, though the consent of the Bundesrat was required to a declaration of war except in the case of an attack upon the federal territory or its coasts. It must be remembered, however, that through the Prussian delegation the Kaiser had an all but dominating influence over the Bundesrat.

All this has, of course, been altered. The Reichstag is now supreme alike in the domain of foreign and of domestic policy. The declaration of war and the conclusion of peace require legislation in the Reichstag, as do certain treaties. Apart from the right of questioning Ministers and bringing forward motions on foreign policy

Control  
of  
Foreign  
Policy

Ger



the co-operation of the Reichstag in international affairs is further secured by the appointment of a special Committee for this purpose. It is the duty of this Committee to keep the foreign policy of the Ministry under permanent observation, to remain in constant touch with the Foreign Office, and to exercise control over it. To enable it to do this effectually it continues to sit even during the adjournments of the Reichstag, and in the interval between the dissolution of one Reichstag and the meeting of another. The Committee has, moreover, the right to inspect all official documents alike of the Reich and of the Federal States, and to summon and examine all officials, or other witnesses whom they may desire to interrogate. The Federal Governments as such enjoy no rights in the domain of foreign policy, but the Reichsrat has its own Committee for Foreign Affairs, as well as other Committees corresponding with the different Departments of State, and the Ministry is obliged to keep these Committees, and through them the Reichsrat, informed as to the conduct and course of national affairs. The Committee for Foreign Affairs can be summoned at the request of any representative of a Federal State, its chief function being to keep the Federal Governments informed about Foreign Affairs. It possesses, however, no formal right to interfere, in this matter, with the Government of the Reich.

Sweden      That Germany should have gone so far in democratizing the machinery for the control of foreign policy is perhaps the most striking illustration of recent tendencies. But few States have altogether escaped them. All the Scandinavian States have recently democratized their machinery in this respect. In Sweden important constitutional amendments came into force in 1921. Of these one provided for the setting up of a permanent Parliamentary Committee on Foreign Affairs 'to confer with the King on matters affecting Sweden's relations to foreign Powers'. This Committee is composed of sixteen members, eight from each Chamber. The members are elected annually at the opening of each session in proportion to the strength

of parties in the Chamber. The Committee may be summoned to meet not only on the initiative of the Executive but on the request of any six members. The King usually presides in person, and he may require the attendance of Cabinet Ministers or any experts with special knowledge of the subject in hand. The Foreign Minister is required to lay before the Committee, at the opening of each session, or whenever the occasion demands, a report on the diplomatic situation. The Committee, whose members are under a strict pledge of secrecy, must be consulted before any important decision is taken in foreign policy; but the decision rests with the Cabinet. The Cabinet must, however, communicate their decision to the Committee at the first opportunity, and the latter are entitled to see all documents. Under the Constitutional Amendments of 1921 it is further provided that all agreements with foreign Powers must, save in exceptional cases, be made subject to ratification by the Riksdag. In such cases as are excluded from the purview of the Riksdag the Foreign Affairs Committee must be previously consulted.

In Norway, too, the need for more precise information on Foreign Affairs was accentuated by the War. A Parliamentary Committee was accordingly set up in 1917, but the members of the Storting resented their exclusion from the discussion of foreign policy. Accordingly, the Committee was, in 1923, reconstituted more or less on the German model and is now reported to be working satisfactorily. Denmark in the same year set up a similar Committee.

Norway  
Denmark

Austria, Finland, Hungary, Bulgaria, and the Serbo-Croat-Slovene Kingdom are among the European States whose Parliaments have no Standing Committee for Foreign Affairs; Roumania, Czecho-Slovakia, Turkey, Poland, and the Kingdom of the Netherlands are among those which have. The Polish Diet conducts a large part of its business by means of Standing Committees, the most important of them being, perhaps, the Committee on Foreign Affairs. This Committee consists of thirty-one

Poland

members, nominated afresh in proportionate numbers, by the Caucuses of their respective parties, after each General Election. The members retain their seats for the life of the Parliament, i. e. a maximum period of five years. The Committees of the Senate are similar to those of the Diet, but the Senate Foreign Affairs Committee, of seventeen members, deals also with military matters. The powers of the Foreign Affairs Committee are not strictly defined, and, indeed, there is at present (1924) a difference of opinion as to the status of the Committee. One party maintains that its functions are purely advisory, and that the Committee is responsible to the Diet as a whole; another party holds that if the Committee expresses its disapproval of the Minister for Foreign Affairs he is constitutionally bound to place his resignation in the hands of the Prime Minister, without awaiting a vote of the Diet. All treaties and agreements are referred in the first instance to the Committee, and its Report is generally accepted, without demur, by the Diet. The Committee meets in public, unless order is otherwise taken. Generally speaking, however, the procedure and powers of the Committee follow the French model.

The  
Nether-  
lands

A Standing Committee for Foreign Affairs has existed in the Dutch Legislature only since 1919. Its nine members are appointed each session by the President of the Second (or Lower) Chamber, who himself acts as Chairman of the Committee with the Recorder of the Chamber as Secretary. Under the revised Constitution of 1922 the Sovereign may no longer declare war without the previous consent of the States-General, whose sanction is also essential, as a rule, to the ratification of Treaties.

Italy

The Italian Chamber of Deputies set up, in 1920, a series of permanent Commissions, one of them being a 'Commission for Political Relations with Foreign Countries and for the Colonies'. But most of them were swept away by the new electoral law of 1923, which has reverted to the earlier system of *ad hoc* Committees. Only one permanent Commission—that on the Budget ('la Giunta Generale del

Bilancio ')—has survived. It consists of thirty-six Deputies, appointed for the duration of the Session, and they divide themselves into Sub-Commissions for the examination of the Departmental budgets. Among these, the 'Sub-Commission for Foreign Affairs', writes Sir Ronald Graham, 'is an organ whose functions are not restricted to merely financial questions, but which amounts to a commission of great political importance.'<sup>1</sup>

The Italian Senate has a standing 'Commission for Foreign Policy', consisting of eleven Senators, who are nominated each session by the Senators. This Commission is specially charged, in accordance with Article 39 of the Senate regulations, with the duty of 'receiving from the Government information about foreign policy and international negotiations and of asking for information on the subject'. It is also the function of this Commission to examine international treaties submitted for the approval of the Senate, with the exception of treaties of commerce and treaties of private law ('diritto privato'), which are examined by a special Commission in accordance with ordinary legislative procedure.

The negotiation and conclusion of International Treaties comes within the prerogative of the Crown; but the Constitution (§ 5) prescribes that notice of them must be given to the Chamber 'as soon as the interests and security of the State permit, and the appropriate Communications on the subject must be made to the Chamber'. Moreover, the approval of Parliament is required, not only for treaties involving a financial burden upon the State, but also for those involving territorial changes, and, by gradually established usage, for treaties of commerce and navigation, which may indirectly affect the finances of the State. Even such Treaties as are not subject to the approval of Parliament are communicated textually to it, as soon as the interests of the State permit, but of those interests the Crown is judge.

From the foregoing summary, rough and rapid though

<sup>1</sup> Cmd. 2282, p. 32.

it be, two conclusions seem to emerge : on the one hand, that in few Parliaments is there so little of formal machinery for consideration and control of Foreign Policy as in our own ; on the other, that in foreign legislatures the machinery for this purpose has been in some cases actually devised, in others materially strengthened, since the Great War.

The changes in procedure are relatively least important, as indeed was to be anticipated, in the two great States which, differing from each other so fundamentally in constitutional type, have this in common : that they initiated the system of Parliamentary Committees much sooner than other countries, and that they have gone farther than others in the articulation and elaboration of the system.

United  
States

The peculiar functions in regard to Treaties attributed by the American Constitution to the Senate gives to the Senate Committee on Foreign Relations special importance. It now consists of seventeen members (formerly of fifteen), ten being members of the majority, and seven of the minority party. The Lower House has a Committee on Foreign Affairs, consisting of twenty-one members, twelve being of the majority and nine of the minority party. Both Committees, and their respective chairmen, are now appointed by the Committee on Committees in each House, which in effect means the Legislative Caucuses of the respective parties. In the Senate Committee the senior member of the dominant party acts as Chairman ; in that of the Lower House he is nominated by the House itself. The two Committees are entirely independent of each other : even more so than the two Houses, and they never meet together.<sup>1</sup>

The Committees have the power to summon witnesses and to compel their attendance ; but they have no absolute right to inspect State documents, or to demand information from the President or his officers. A request for information or documents addressed by the Chairman

<sup>1</sup> Cd. 6102, p. 32.

to the President or Secretary of State would, however, in practice, be complied with as a matter of course. Except when evidence is being taken or when an interested party requests to be heard by the Committee, the deliberations of the Committees are, at least nominally, secret.<sup>1</sup> Reports made by the Committees to Congress are, however, printed as public documents, and are frequently inserted in the *Congressional Record*.

There are no formal rules governing the relations between the Executive and the Committees on Foreign Affairs, nor, as a rule, is there any formal or official communication between them. In August 1919, however, President Wilson summoned a Committee to the White House, in connexion with the Peace Treaties, and answered questions put to him by various members of the Committee. The proceedings were, on this occasion, printed in the report of the Committee.<sup>1</sup>

Sir Esme Howard, now British Ambassador at Washington, points out that the exclusive right of the President and Senate to make peace has, in fact, been modified by the procedure adopted on the conclusion of peace between the United States and Germany and Austria respectively after the Great War. In both cases peace was declared by the President approving a joint Resolution of both Houses of Congress.

Lord Bryce's considered judgement on the senatorial participation in Foreign Affairs is not altogether favourable. The Senate Committee usually, he says, contains 'a few able men among others who know little of anything outside their own country, and may regard the interests of their own State rather than those of the Union. Jealous of its own powers, and often impelled by party motives, the Senate has frequently checked the President's action, sometimes with unfortunate results.'<sup>2</sup> These words, it should be noted, were written before the conclusion of the Peace Treaties.

<sup>1</sup> 'It can debate with closed doors, but this does not ensure secrecy.'—Bryce, *Democracies*, ii. 409.

<sup>2</sup> *Democracies*, ii. 409. Cf. Thayer, *Life of John Hay*.

No State, federal or unitary, presidential or parliamentary, has gone so far as the United States in the attempt to apply in practice Montesquieu's central doctrine of the Separation of Powers. The divorce between the Executive, the Legislature, and the Judiciary is under the American Constitution carried about as far as it can be without inducing paralysis in the Governmental organs. Perhaps in consequence of this characteristic feature of American institutions, perhaps in spite of it, Congress has developed the Committee system more fully than any other Legislature, with the possible exception of France.

France The French 'Organic Laws' of 1875 confide to the President the right to 'negotiate and to ratify treaties', but require him to 'communicate them to the Chambers as soon as the interests and the safety of the State allow'. Negotiation is, therefore, exclusively the function of the Executive. So strictly is this principle enforced that when in April 1919 a Resolution was brought forward in the Chamber of Deputies requesting the Government 'to maintain and carry through at the Peace Conference the principle that Germany must keep neither army nor military organization nor armaments of any kind', the President of the Chamber refused to allow it to be proposed. He held that the proposed Resolution implied interference with the exclusive right of the Executive to negotiate treaties, and, according to the memorandum forwarded by the British Ambassador<sup>1</sup> in Paris, the President's 'ruling on the point was accepted without demur'.

Ratification is also technically the function of the Executive: though the limits of its discretion are narrow, since 'Treaties of peace, of commerce, Treaties which affect the finances of the States, Treaties relative to the status of persons and to the property rights of Frenchmen abroad are only binding after having been voted by the two Chambers'. Moreover, 'no cession, no exchange, no

<sup>1</sup> Cmd. 2282.

adjudication of territory can take place save under a law. The President of the Republic cannot declare war without the prior consent of the two Chambers.'

It might be supposed that all treaties would be covered by these wide exceptions, and that the Constitutional rights of the Executive would thereby be reduced to nullity. Indeed, such a claim has actually been put forward by some judicial authorities. But, as Lord Crewe's memorandum points out, the contention is refuted by the facts. A study of the parliamentary annals of the Third Republic shows that there are a number of matters of the first importance on which treaties have been in fact concluded and ratified without a vote in either Chamber. It shows also that there are a number of matters in regard to which the Executive is under no obligation to inform the Chamber of the tenor of treaties arrived at with foreign Powers or even of the existence of such treaties. Instances may be quoted. The Treaty of Berlin of July 1878 to which the French Government was a party, and by which an important stage in the history of the Near Eastern Question was marked, was not submitted to either of the French Chambers. M. Pierre, the recognized authority in French Constitutional procedure, apparently holds that such submission was unnecessary, since the Treaty of Berlin was not a treaty of peace, but a 'Convention designed to prevent war'. The Franco-German Convention of November 1911 relative to the political status of Morocco was not submitted to the Chambers, because, M. Pierre states, 'it dealt only with measures preliminary to the establishment of the French protectorate.' The Franco-Czecho-Slovak Treaty of 1924 was not submitted to the two Chambers, because, apparently, it was not a treaty of peace nor a treaty immediately engaging the finances of the State. There is no trace in the debates of either Chamber of the approval by them of the Franco-Belgian Military Convention, which, according to newspaper reports, was concluded between the French and Belgian Governments in Septem-



ber 1920. Neither is there anything to show that the Chambers are privy to its terms.

As a further proof of the incorrectness of the contention that full parliamentary control of the ratification of treaties is directly afforded by the 'Organic Laws', there may be quoted a statement made by M. Poincaré in the Chamber of Deputies during his 1912 Presidency of the Council. This statement, which was accepted by the Chamber, read as follows :

'The Government is ready to submit to the Chambers before any ratification whatever all treaties which may affect, even indirectly, the various matters envisaged by the constitutional law. But it claims for the President of the Republic the right to negotiate in the name of France, and communicate treaties to the Chambers only when the safety and interests of the State allow. As regards secret treaties they cannot, of course, be concluded in violation of the constitutional law, and if they affect matters reserved by that law they can only become definitive after having been published, approved by the Chambers, and officially ratified.'<sup>1</sup>

It is then clear that the French Constitution does contemplate the possibility of the conclusion of treaties without the consent, and, in exceptional circumstance, without the knowledge of Parliament, and that in the exercise of this power by the Executive the Legislature has acquiesced. On the other hand it is equally clear, as the memorandum points out, that 'in the field of foreign affairs, as in that of all legislation and administration, the "organic laws" have provided the Chambers with the opportunity to create *vis-à-vis* the Government a vigorous extended and working system of control'.

Conclu-  
sions

What conclusion, if any, emerges from this survey of the procedure of foreign parliaments? How are the modern democracies shaping in regard to the conduct of their international affairs? In the foregoing summary one omission will be noted—that of Switzerland. But Switzerland—one of the most conservative of democracies—has made no change since the War, though we learn from Mr. Sper-

<sup>1</sup> Cmd. 2282, pp. 16, 17.

ling's dispatch to Mr. Ramsay Macdonald that in 1920 'several members of the National Council signed a motion requesting the Federal Council to draft a Bill to create a permanent commission for foreign affairs'. Nothing, however, has yet been done. The truth is, of course, that Switzerland has in large measure been relieved, if not from the burden of self-defence, at least from the obligation to maintain an elaborate diplomatic system by the peculiarity of its international status.

The United States has been similarly relieved partly by its geographical position, partly by rigid adherence to a tradition which, initiated by Washington himself, has defined the foreign policy of his country from that day to this.

'Europe', said Washington in his farewell speech, 'has a set of primary interests which to us have none or a very remote relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. . . . Our detached and distant situation invites and enables us to pursue a different course. . . . Why forgo the advantages of so peculiar a situation? Why quit our own to stand upon foreign ground? Why, by interweaving our destiny with any part of Europe, entangle our peace and prosperity in the toils of European ambition, rivalry, interest, humour, or caprice?'

Jefferson, on his accession to office in 1801, reaffirmed, in phrase even more trenchant, the maxims first enunciated by George Washington. 'Peace, commerce, and honest friendship with all nations, entangling alliances with none.' Two and twenty years later (December 1823) President Monroe sent that famous message to Congress which for a full century has supplied the sheet anchor of American diplomacy.

Neither Switzerland nor the United States has, then, been seriously troubled by problems of international policy. Consequently, we cannot rely upon the example of these two democracies either to dispel or to confirm the suspicions of that form of polity entertained by the apostles of the old diplomacy.

Demo-  
cracy and  
Diplo-  
macy

The suspicions are in fact mutual. If democracy is suspicious of diplomacy, diplomacy is proverbially shy of democracy. How, it is asked, can the governing masses of the new democracies find the leisure necessary to acquire that knowledge of foreign countries and foreign peoples, of the personalities of the rulers and statesmen of foreign States, of the difficult problems of international politics, for lack of which the democratic control of foreign policy can only flounder in a morass of ignorance? And what is more likely than ignorance to breed suspicion between peoples? Moreover, what dependence can be placed by foreign Governments on the consistence or continuity of a foreign policy controlled by a popular electorate? What is more likely to lead to misunderstandings and even to war than inconstancy in the conduct of international affairs? How often has a difficult crisis been averted by promptitude and courage? Are not popular assemblies notorious for procrastination, neutralized, if not atoned for, by precipitancy of action when prudence demands cautious handling and delay? Is democracy likely to select its instruments—and even democracy cannot dispense with agents—more wisely than autocracy or oligarchy?

Such questions, though crudely stated, cannot be brushed aside either as impertinent or irrelevant. The political philosopher must needs give heed not only to the accusations brought by the new democracy against the old diplomacy, but also to the apprehensions which diplomacy, rightly or wrongly, entertains as to the characteristic frailties of democracy.

One plea is plainly unanswerable. Increased popular control over foreign policy cannot safely be conceded to an uneducated democracy. If 'democracy' is intent upon exercising control it must patiently equip itself for the unaccustomed role; and only education in the true sense can equip it.

Much more remote, if not actually groundless, is the apprehension, frequently expressed, that the democratization of foreign policy will lead to inconstancy and discon-

tinuity. As a fact there has been a larger measure of continuity in English foreign policy since 1885 than in the period immediately preceding it. That may be ascribed to the wisdom of a remarkable succession of Foreign Secretaries—Lord Rosebery, Lord Salisbury, Lord Lansdowne, and Lord Grey of Fallodon;—to name only those who were responsible for the conduct of foreign affairs during the period of the ‘armed peace’. But be that as it may, the fact remains, and it is a fact which must be put to the credit of a democracy, in many respects highly self-conscious, that it should have been content to leave delicate questions in competent hands without undue interference by the Legislature.

There is another and a stronger reason for discounting the fear of discontinuity. It is this. Among all great nations the main lines of foreign policy are to an extraordinary degree traditional. What the French felicitously call *les mœurs politiques* represent something much more substantial than the caprice or even the conviction of a ruling caste. They are bred in the bone of the common folk. The interpretation of the tradition, the method of applying the principle, may vary in some degree from generation to generation, from ministry to ministry. Not so the broad tradition.

Take the problem of the eastern frontier of France. The Bourbon Monarchy, the first Republic, the Napoleonic Empire, first and second, the third Republic—wherein has one differed from another in its attitude towards this problem? Take Italy. Could any Italian minister—Liberal, Socialist, Fascist—eradicate from the mind of the Italian people the tradition of friendship for England, or their passionate desire to regain *Italia Irredenta*? Most striking of all is England. English inconstancy in its continental affinities is an accepted aphorism among foreign diplomatists. In truth nothing could be more remarkable than her adherence to tradition. The one thing which for the last four hundred years could be counted on infallibly to rouse the English people to wrath,

and even to war, has been an attack upon the independence of the Low Countries. Philip II discovered it to his cost in the sixteenth century ; Louis XIV, at the end of the seventeenth century, played into the hands of the Dutch Stadtholder by ignoring it ; the French Republic defied it ; Napoleon I might have retained his crown and established his dynasty had he in 1814 been willing to respect it ; the ex-Kaiser of Germany must often have rued the day when he preferred strategy to policy, and compelled England in August 1914 to draw the sword in defence of Belgium.

Would any change in the machinery of government suffice to defeat the policy of a people inspired by *les mœurs politiques* ? Such a change might indeed materially affect methods and cause modification in detail. But changes in methods, the reversal of alliances, are not unknown to autocrats and oligarchs. Bismarck was the autocratic chief of the Prussian oligarchy. Yet Bismarck's policy underwent profound modification in 1878 when the tangle of Balkan affairs compelled him to choose between Russia and Austria as the ally of Germany. His encouragement of Austria's aspirations in the Balkans virtually dissolved the *Dreikaiserbund* and prepared the way for the Triple Alliance. Similarly, Louis XV of France abandoned a Prussian in favour of an Austrian alliance in 1756, thus sacrificing the carefully garnered harvest of more than a century's diplomacy.

This work is, however, concerned with international relations only so far as the conduct of them reacts upon the internal mechanism of the State.

Preceding paragraphs have shown that the extension of the principle of Popular Government, and the increasingly strict control exercised by popularly elected Legislatures over the Executive Department of the State, has not been wholly confined to domestic administration. They have shown that in many of the continental States an attempt has been made to democratize the conduct of foreign affairs, either by a demand that all treaties between State and State shall be subject to ratification at

the hands of their respective Legislatures, or by setting up a Standing Committee of the Legislature to act, in the sphere of Foreign Policy, as a check upon the Executive, or by both methods.

Neither method has in fact proved wholly effectual. Both, it is true, have been applied tentatively and with reservations. The truth is that some element of secrecy is inseparable alike from negotiation and from completed international covenants. Even the League of Nations has decided that Article 18 of the Covenant, which prescribes the registration of treaties and international engagements, does not compel the registration of all international instruments, nor exclude the reservation in secrecy of certain portions of the instruments actually submitted for registration. Nevertheless the assertion of the principle of 'open' diplomacy has made undeniable progress. Down to the end of 1925 no fewer than 364 treaties have been already registered.<sup>1</sup>

As to the device of Standing Committees on Foreign Policy, much has been written in preceding paragraphs. The effectiveness of such machinery varies greatly in different countries. In the United States such a device is in complete harmony alike with the genius of the Constitution and with the traditions of the people. But although its effectiveness cannot be denied, the beneficence of its operations has, not without reason, been hotly disputed. Apart from the United States it cannot be said that the attempts to democratize the control of foreign policy have thus far been attended with conspicuous success. It is, however, fair to add that the experiment has hardly had a fair chance: only in a few States has Democracy, even now, got a firm seat in the saddle; it is, as yet, lacking in experience of administration, particularly in the sphere of international politics; above all, the conditions for political experiments have not, of late, been favourable.

Much scorn has been heaped upon the attempt to

<sup>1</sup> *A History of the Peace Conference at Paris*, ed. Temperley, vol. vi, p. 562.

## PROCEDURE

substitute diplomacy by conference for the older methods of negotiation. Direct intercourse between Ministers responsible to their respective Legislatures is doubtless more consonant with democratic principles than the system of permanent residential embassies. Yet the fruits gathered by diplomacy by conference have not as yet been so luscious as to commend the new mode for universal acceptance. It is all to the good that the parliamentary Ministers of different countries should be personally acquainted, but it is a pure assumption that direct negotiation between men who are answerable to their respective Legislatures will necessarily tend to the avoidance of international friction, or the speedy and permanently satisfactory solution of diplomatic problems.

Nevertheless the persistent effort on the part of popularly elected Legislatures—by questions and interpellations, by public debate in the Chamber, and by the development of the system of Standing Committees—to exercise increased control over the Executive, has already effected important modifications in the machinery of government, and may not improbably contribute in the near future to changes even more fundamental. Such changes cannot fail to react powerfully upon parliamentary procedure, and may even modify profoundly the whole conception and operation of Parliamentary Democracy.

In the preceding paragraphs, and indeed throughout a great part of this and preceding chapters, an analysis of the machinery by which the Legislature works has involved reference to the appropriate functions of the Executive, and of the relations of the one to the other. To a consideration of the problems connected with the executive side of government we shall, therefore, forthwith proceed.

